Petition

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No. 81-____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BANKAMERICA CORPORATION, BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, BANKERS TRUST NEW YORK CORPORATION, BANKERS TRUST COMPANY, CROCKER NATIONAL BANK, CROCKER NATIONAL CORPORATION, THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, METROPOLITAN LIFE INSURANCE COMPANY, THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, PAUL A. GORMAN, EMMETT G. SOLOMON, AND THOMAS R. WILCOX,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether Section 8 of the Clayton Act, which expressly prohibits an individual from serving simultaneously as a director of "two or more [competing] corporations . . . other than banks," also prohibits an individual from serving as a director of a bank or bank holding company and a corporation other than a bank, such as an insurance company, despite more than sixty years of contrary understanding on the part of Congress, the antitrust enforcement agencies and business.

PARTIES

All parties are named in the caption. [1]

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[1] In accordance with Rule 28.1 of the Rules of the Supreme Court, the parent companies, subsidiaries and affiliates of each party are set forth in the separately bound volume of Appendices at Appendix E at 91a-93a.

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Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit in two companion civil cases involving the parties named in the caption who are listed above pursuant to Rule 19.4.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Chief Circuit Judge Browning and Senior District Judge Christensen; Circuit Judge Kennedy dissenting), reported at 656 F.2d 428, is reprinted as Appendix A at 1a-50a. The opinion of the United States District Court for the Northern

District of California (Chief District Judge Peckham), reported at 422 F. Supp. 686, is reprinted as Appendix B at 51a-85a.

JURISDICTION

The decision of the court of appeals was entered on September 14, 1981. A timely petition for rehearing and suggestion of rehearing *en banc* was denied on November 10, 1981. *See* Appendix C at 86a-87a. An uncontested motion to stay the mandate pending the filing, consideration and disposition of this petition by this Court was granted by the court of appeals by order dated November 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The unnumbered fourth paragraph of Section 8 of the Clayton Act, 38 Stat. 732, as amended, 15 U.S.C. § 19, is set forth below. (For ease of reference, the various modifying clauses in the fourth paragraph of Section 8 have been set forth separately and identified by numbers [in brackets] that are not in the original.)

> No person at the same time shall be a director in any two or more corporations,
>
> [1] any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000,
>
> [2] engaged in whole or in part in commerce,
>
> [3] other than banks, banking associations, trust companies, and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven,
>
> [4] if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by

agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

The full text of Section 8 is reprinted as Appendix D at 88a-90a.

STATEMENT

Companion test cases were brought by the Department of Justice in 1975, challenging the legality under Section 8 of the Clayton Act of banks and insurance companies having common directors.[2] This petition seeks review of a judgment of the Court of Appeals for the Ninth Circuit which by a divided panel reversed the decision of the district court and held that common directors of banks and insurance companies are within the scope of Section 8.

A. Legislative and Administrative Background

Section 8 of the Clayton Act was not intended to, and does not, prohibit all interlocking relationships between corporations. Rather, it only prohibits certain corporations from having common directors under certain circumstances. This case is concerned only with the unnumbered fourth paragraph of Section 8, known as the "industrial corporations" paragraph, which has not been amended in any material respect since its enactment in 1914. That paragraph prohibits a person from serving simultaneously as "a director in any two or more corporations" that satisfy four statutory criteria: [1] at least one of the corporations must have "capital, surplus and undivided profits aggregating more than $1 million"; [2] the two corporations must be "engaged in whole or in part in commerce"; [3] the two corporations must be "other than banks . . . and common carriers"; and [4] the two corporations must be "competitors, so that the elimination of competition by agreement between them would

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[2] Jurisdiction was based on 28 U.S.C. § 1337.

constitute a violation" of the antitrust laws.[3] The first three unnumbered paragraphs of Section 8 are known as the "bank" paragraphs because they regulate common directors of banks and other banking institutions, forbidding the practice in some situations and permitting it in others.

When Section 8 was enacted in 1914, directors of banks sat on the boards of insurance companies, as they had for many years. Since then, banks and insurance companies have continued to share directors, and the practice is so commonplace that, by the Government's own estimate, about 40 percent of insurance company directors are also directors of banks.[4]

This widespread and long-established business practice has been no secret. Nevertheless, for over sixty years no court or administrative agency held it to be a violation of Section 8. Neither the Federal Trade Commission nor the Department of Justice ever invoked Section 8 to challenge the sharing of directors by banks and insurance companies. Both agencies accepted that the fourth paragraph of Section 8 meant what it said in prohibiting only those interlocking directorates involving "two or more corporations" other than banks. Congress has also accepted this view and has rejected numerous proposals to amend the statute to prohibit the practice.

B. Proceedings Below

Despite this history, in 1975 the Government decided to test the reach of Section 8 by suing three banks and their related

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[3] The statute imposes an absolute ban on interlocks that satisfy the criteria. No showing of wrongdoing, restraint of competition or illicit personal gain is required. There are no allegations of such conduct with respect to any of the interlocks here.

[4] *See* App. A at 7a; App. B at 58a. Indeed, according to present industry statistics compiled by the American Council of Life Insurance, more than 50% of the directors of the nation's life insurance companies are also directors of banks. For those statistics, as well as other pertinent industry data, *see generally*, Brief Amicus Curiae on Behalf of the American Council of Life Insurance.

holding companies, four insurance companies, and individuals who at the time of suit were directors of one of the banks or bank holding companies and one of the insurance companies, asking for declaratory and injunctive relief. These common directorates were challenged only under the fourth paragraph of Section 8 and not under the first three paragraphs of that section relating to banks.

The Government challenged the common bank/insurance company directors (called "bank interlocks" in the opinions below) on the ground that the paragraph relating to directors shared by "two or more corporations . . . other than banks" applies to an interlock even though only *one* of the corporations satisfies the "other than banks" requirement. The Government challenged the common bank holding/insurance company directors (called "bank holding interlocks" in the opinions below) on the ground that "competitors," as used in Section 8, includes corporations competing vicariously through a separately operated subsidiary.

The question of law concerning the meaning of the statutory phrase "two or more corporations . . . other than banks" was presented to the district court on cross motions for summary judgment and a stipulated record that encompassed all facts and other considerations material to the decision of that question. For example, the defendants stipulated that the bank defendants and the insurance company defendants were in competition with one another and waived any defense that the competition was not so substantial as to make an agreement to eliminate it an antitrust violation.

After briefing and oral argument, the district court granted petitioners' motions for summary judgment and dismissed the Government's cases. Chief Judge Peckham ruled that a "normal reading" of the statutory language "two corporations . . . other

than banks" compelled the conclusion that *both* corporations sharing a common director must be "other than banks" in order to satisfy that express statutory requirement. (App. B at 56a) Since the challenged interlocks involved only one corporation other than a bank, they did not satisfy that requirement and therefore were not prohibited by the statute.

The case was argued on appeal in November 1978. In September 1981 the court of appeals found the statutory language ambiguous and reversed the district court on the basis of what it saw as Section 8's broad general legislative purpose to prohibit all interlocking directorates between competitors.

REASONS FOR GRANTING THE WRIT

This case presents a question of exceptional importance: the extent to which interlocking directorates involving banks and bank holding companies, on the one hand, and non-banking corporations, on the other, are prohibited by the federal antitrust laws. This question has not been but should be settled by this Court.

The question is not settled by the decision below, even though the Government brought the test cases to obtain a definitive ruling. This issue of the reach of Section 8 of the Clayton Act produced a sharp and even split of opinion among the four judges who considered it. If left standing, the divided decision of the court of appeals threatens to eliminate or sharply curtail a long-standing practice which involves a significant percentage of the directors of the nation's insurance companies.

A. The Court of Appeals' Decision Will Have a Substantial Impact on the Nation's Financial Community and Will Necessitate Widespread Changes in the Composition of the Boards of Directors of Banks, Bank Holding Companies and Insurance Companies

The divided decision below would affect all banks and insurance companies -- indeed the entire financial community —

not just the named parties or banks and insurance companies located within the Ninth Circuit. Since corporations may be sued under the antitrust laws wherever they are found or transact business, 15 U.S.C. §§ 15, 22, the court of appeals' decision would have a direct impact on every bank holding company, bank and insurance company that does business within the Ninth Circuit, regardless of its principal location. Thus, it would apply to a significant number of financial institutions throughout the country. For example, six of the ten corporate petitioners have their headquarters and conduct a substantial percentage of their business outside the Ninth Circuit. Moreover, as the only decision on this question, the court of appeals' opinion would inevitably have a significant impact even on those banks and insurance companies that are not found in the Ninth Circuit.

The threatened impact of the court's decision on banks and insurance companies is severe. Both banks and insurance companies, whether large or small, seek directors who have broad financial or industrial experience. As recognized by Chief Judge Peckham, "it is essential that the board of directors of insurance companies include individuals who have investment experience, particularly in the lending area, and who can exercise expert judgment concerning the investment activities of the company." (App. B at 78a) The funds of millions of individuals have been entrusted to these companies to provide financial security through the purchase of insurance, annuities and other protection. The obligation to pay these benefits may not mature for periods as long as fifty years or more. The directors of insurance companies bear a heavy responsibility to ensure that these funds are prudently invested so that the companies are able to meet such obligations and to provide the financial security that has been promised. Considering the billions of dollars that these companies invest annually, the policy making and reviewing functions of the board of directors, particularly with respect to investments, assume major importance.

Similarly, banks need competent directors with proven financial backgrounds. Bank directors, like insurance company directors, are charged with the responsibility of overseeing their managements in the investment of billions of dollars of personal savings. They also oversee advisory and management services provided by banks to countless individuals, trusts, estates and other investors. The number of qualified individuals ready, willing and able to undertake such enormous responsibilities is not unlimited.

Surely, the substantial number of directors common to the boards of banks and insurance companies is a reflection of these realities. Insurance companies have drawn upon the pool of financial and industrial experts who also serve as bank directors for 40 percent or more of the members of their boards. If that pool dries up, the effect upon insurance companies, banks and bank holding companies will be substantial.

This litigation has received widespread publicity and has been closely followed by the business and financial community across the nation. Now, despite the test nature of the case, the nation's banks, insurance companies and other financial institutions have not received definitive guidance on the important legal question of whether an individual may serve as a director of a bank and an insurance company. As a result, unless this Court intervenes, a wholesale reordering of the managing bodies of a large segment of the financial community may be set in motion by a decision endorsed only by a single circuit judge.

B. The Question Presented Is Substantial, as Indicated by the Sharp and Even Division of Opinions Below

The four United States judges who participated in the cases heard below were equally divided on the fundamental question presented here. One circuit judge and one district judge agreed

with petitioners that the fourth paragraph of Section 8 of the Clayton Act, by its explicit and unambiguous language, applies only when an individual serves as a director of two corporations neither of which is a bank. One circuit judge and one district judge disagreed. Resolution of a question of such far-reaching consequences should not rest on such an even split of views.

For the district court, Judge Peckham analyzed the words of Section 8 and found them clear and unambiguous. He properly noted that the fourth paragraph of Section 8 contains four clauses, each of which modifies the statutory phrase "two or more corporations." (*See* pp. 2-3, *supra*, where the statute is divided as Judge Peckham divided it for purposes of his analysis, App. B at 56a-57a) He then stated that it is "readily apparent . . . that all of the four limiting clauses apply to both corporations involved in an interlock, except for the first clause which by its own specific terms may be satisfied by 'any one of' the interlocked corporations." (App. B at 57a) Thus, Judge Peckham found that both of the interlocked corporations must be engaged "in commerce" to satisfy clause 2, that both must be "competitors" to satisfy clause 4, and that, critically, "they must both be other than banks, banking associations, trust companies and common carriers" to satisfy clause 3. (App. B at 57a) Since the challenged director interlocks did not involve two entities "other than banks,"[5] Judge Peckham held that the statute did not reach them. He found that this natural reading of the words of the fourth paragraph of Section 8 was confirmed by

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[5] The Government challenged the holding company interlocks solely by imputing to the holding companies the competition between their bank subsidiaries and the insurance company defendants. Since the District Court found that Section 8 did not prohibit the bank interlocks, it found *a fortiori* that Section 8 did not prohibit the holding company interlocks either. If the question of the legality of the bank interlocks is resolved in petitioners' favor, it is impossible to escape the logic of the district court's reasoning that the bank holding interlocks are also legal. But, even if the bank interlocks

long-time congressional and administrative understanding, by the context of that paragraph in Section 8 and the rest of the Clayton Act, and by the very full and illuminating legislative history of Section 8. (App. B at 58a-77a)

On appeal, a divided panel of the Ninth Circuit reversed the district court. The majority acknowledged that the statute could be read plausibly as Judge Peckham read it but concluded that it could also be interpreted as the Government contended. Having thus discerned ambiguity in the statute that others had never detected, the majority of the panel invoked what it perceived as the broad legislative purpose of Section 8 to prohibit director interlocks between competitors. It relied on this perceived purpose to resolve the ambiguity it had erected in favor of the awkward reading of the statute advanced by the Government, discounting or dismissing every element of the district court's detailed analysis of the specific language and legislative history of Section 8 and of the more than sixty years of legislative and administrative understanding that the statute does not apply to bank/non-bank interlocks.

Circuit Judge Kennedy, in dissent, adopted the district court's analysis. He pointed out that the nebulous statements of general legislative purpose on which his colleagues relied were of little help in construing the very precise statutory provision at issue here. Judge Kennedy characterized the majority's judicial construction as an effort to "patch . . . up" what the majority viewed as an "imperfection" in the legislative design, which, far from an imperfection, was "in fact the result of compromises which are the very essence of the legislative process." (App. A

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are found illegal, petitioners submit that there is nothing in the bank holding company-bank relationships here to take the case of an interlocking relationship between a bank holding company and another corporation out of the general rule under Section 8 that, as the court of appeals stated, "[a] parent corporation is not a competitor of another corporation merely because its subsidiary is." (App. A at 38a)

at 49a) In response to the majority's emphasis on the very general overall purpose of the Clayton Act and Section 8, Judge Kennedy noted that the obvious specific purpose of the "other than" clause was to *narrow* the range of the statute's coverage and observed that, if Congress had intended that clause to require only one of the two corporate parties to an interlocking relationship to be other than a bank, "it would have used much different language to do so." (App. A at 49a-50a)[6]

C. The Court of Appeals' Decision Is Contrary to More Than Sixty Years of Consistent Statutory Interpretation and Business Practice

This Court should review the question here presented because the court of appeals majority has abruptly departed from an understanding manifested in decades of consistent statutory interpretation, as well as accepted practice in the nation's insurance and banking industries.

The practice of banks and insurance companies having common directors was specifically mentioned in the legislative history of Section 8.[7] The widespread existence of such common directors has been consistently recognized and left unchallenged by Congress and antitrust enforcement agencies ever since.[8] For over sixty years, the antitrust enforcement agencies did not question the legality of this widespread practice. In-

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[6] As the district court recognized, when Congress intended that only *one* of the interlocked corporations need satisfy any of the four modifying clauses of the statute, it was capable of stating so explicitly, as it did with respect to the requirement that only one of the corporations need have $1 million in assets (clause [1]).

[7] Hearings on Trust Legislation Before the House Committee on the Judiciary, 63d Cong., 2d Sess. 925 (1914).

[8] Congressional and administrative reports were collected in Appendix I of Petitioners' Appeal Brief, a copy of which has been lodged with the Clerk.

deed, both Congress and the responsible enforcement agencies, faced with the plain meaning of the words used by Congress in Section 8, concluded, as did Chief Judge Peckham, that such interlocks were *not* prohibited by the Clayton Act.

The Federal Trade Commission informed Congress in 1950 in a report on interlocking directorates that the prohibition of the fourth paragraph of Section 8 "leaves unchallenged interlocking directorates between . . . industrial and commercial corporations and financial institutions."[9] The Department of Justice obviously shared this view until 1975 because it brought no Section 8 suits involving banks. Even on the eve of bringing these cases, in 1974, the head of the Antitrust Division acknowledged that Section 8 "may not be directly applicable" to interlocking relationships between financial institutions and insurance companies.[10] Several congressional reports, exemplified by one published in 1968, stated flatly that after the enactment of the Clayton Act "the banks remained and still remain free to have representations on the boards of any non-banking corporation."[11]

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[9] *The Report of the Federal Trade Commission on Interlocking Directorates*, H. Doc. No. 652, 81st Cong., 2d Sess. 10 (1950).

Subsequent to the filing of these cases, the Federal Trade Commission brought an action under Section 5 of the Federal Trade Commission Act, and not Section 8 of the Clayton Act, challenging common directors of a bank and a savings and loan association. Following legislation exempting savings and loan associations from the jurisdiction of the FTC, the actions was ultimately vacated. Perpetual Fed. Savings & Loan Ass'n, 90 F.T.C. 608 (1977), *vacated*, 94 F.T.C. 401 (1979).

[10] 81 *American Metal Market*, No. 137, July 16, 1974.

[11] Staff of the Subcomm. on Domestic Finance of the House Comm. on Banking and Currency, 90th Cong., 2d Sess., I *Report on Commercial Banks and their Trust Activities: Emerging Influence on the American Economy* at 11 (Subcomm. Print 1968).

Bills to modify Section 8 to make it cover interlocks of the sort challenged here have been offered regularly in Congress. [12] All were rejected, except that, in 1933, Congress did add a new Section 8A to the Clayton Act, which prohibited interlocking relationships between banks and other corporations that made "loans secured by stock or bond collateral to any individual, association, partnership, or corporation other than its own subsidiaries." [13] The new section was, however, repealed two years later [14] with, the district court noted, "the specific intention of eliminating the prohibition of interlocking directorates among banks and institutions with which they competed in making loans." (App. B at 60a)

Even since the district court's 1976 decision in this case, Congress has manifested its continuing purpose to deal specifically and selectively — and not as part of more general statutory provisions — with interlocking relationships between banks and other companies. [15] In 1978 the comprehensive Depository

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[12] H.R. 11572, 89th Cong., 1st Sess. (1965); H.R. 2509, 90th Cong., 1st Sess. (1967); H.R. 2346, 91st Cong., 1st Sess. (1969); H.R. 3245, 92d Cong., 1st Sess. (1971); H.R. 5700, 92d Cong., 1st Sess. (1971); H.R. 13581, 93d Cong., 2d Sess. (1974); H.R. 14997, 93d Cong., 2d Sess. (1974); H.R. 4406, 94th Cong., 1st Sess. (1975).

[13] Act of June 16, 1933, P.L. No. 66, ch. 89, § 33, 48 Stat. 194.

[14] Act of August 23, 1935, P.L. No. 305, ch. 614, § 329, 49 Stat. 717.

[15] Several earlier statutes, as well as the short-lived § 8A of the Clayton Act, reflected this approach. *See, e.g.*, 12 U.S.C. § 78 (interlocks between organizations primarily engaged in the underwriting, flotation, issue, public sale or distribution of stocks, bonds or similar securities and member banks of the Federal Reserve system); 15 U.S.C. § 79q(c) (interlocks between registered public utility holding companies and banks); 15 U.S.C. § 80a-10(b)(2) (interlocks between registered investment companies and underwriters including municipal bond underwriters such as banks); 15 U.S.C. § 80a-10(c) (interlocks between directors of registered investment companies and officers, directors or employees of a bank); 16 U.S.C. § 825d (management interlocks between a public utility and any bank, trust company or banking association that is authorized by law to underwrite or participate in the marketing of securities of a public utility).

Institution Management Interlocks Act was enacted to regulate interlocking relationships involving banks and bank holding companies and other depository institutions such as savings and loans and credit unions. 92 Stat. 3672, 12 U.S.C. §§ 3201-07. Amendments that would have made that legislation prohibit director interlocks between banks and insurance companies were rejected. [16]

For more than sixty years the understanding of Congress, the antitrust enforcement agencies and the financial community was that interlocking directorates between banks and insurance companies were permitted by Section 8. Without any change in the governing statutory language, a divided court of appeals has abruptly departed from that common understanding. This Court's review of that departure is essential.

D. This Court Can and Should Review The Exceptionally Important Question Presented

Review by this Court at this time is necessary and appropriate. The Court does not need further elucidation of the kind that it sometimes hopes to obtain by awaiting analysis by additional lower federal courts. This case presents a pure legal question as to the jurisdictional reach of a basic provision of the antitrust laws. The issue has been precisely framed. The record is fully developed and uncontroverted. The two opinions here are as thorough expositions of the issue as the Court could reasonably expect, however many circuits might plow the same ground.

The legal issue presented here is precisely the type of question that the Court sits to resolve. The interpretation of the scope and effect of the nation's antitrust laws has long been the

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[16] 124 Cong. Rec., H11711-H11713 (daily ed. October 5, 1978); H.R. Rep. No. 1383, 95th Cong., 2d Sess. 200-01.

province of this Court.[17] A single circuit judge and a single district judge should not establish the extent to which the federal antitrust laws govern interlocking directorates. That is particularly true in this case where there is an irreconcilable conflict in statutory interpretation between the two judges who ruled against the Government and the two judges who ruled in favor of the Government.

Unless this Court acts now to resolve the unsettled question presented here in a dispositive fashion, it may be years before the issue is finally resolved at the highest judicial level. In view of the impact of the court of appeals' decision on a segment of our economy that is critical to the financial well-being of the nation and that affects so many people, the need for a prompt and final resolution of the purely legal question presented is particularly acute.

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[17] *See, e.g.*, Standard Oil Co. v. United States, 221 U.S. 1 (1911) (Section 1 of Sherman Act); Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953) (tying arrangements under Section 1 of the Sherman Act and Section 3 of the Clayton Act); United States v. E. I. duPont de Nemours & Co., 353 U.S. 586 (1957) (vertical acquisitions under Section 7 of the Clayton Act); Brown Shoe Co. v. United States, 370 U.S. 294 (1962) (horizontal acquisitions under Section 7 of the Clayton Act); and United States v. Grinnell Corp., 384 U.S. 563 (1966) (monopolization under Section 2 of the Sherman Act).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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February 8, 1982

Appendix

81-1487

No. 81-____

FILED

FEB 8 1982

ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BANKAMERICA CORPORATION, BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, BANKERS TRUST NEW YORK CORPORATION, BANKERS TRUST COMPANY, CROCKER NATIONAL BANK, CROCKER NATIONAL CORPORATION, THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, METROPOLITAN LIFE INSURANCE COMPANY, THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, PAUL A. GORMAN, EMMETT G. SOLOMON, AND THOMAS R. WILCOX,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,
Plaintiff-Cross-appellee,

v.

CROCKER NATIONAL CORP., *et al.*,
Defendant-Cross-appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

CROCKER NATIONAL CORP., *et al.*,
Defendant-Appellees.

UNITED STATES OF AMERICA,
Plaintiff-Cross-Appellee,

v.

BANKAMERICA CORPORATION, *et al.*,
Defendants-Cross-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

BANKAMERICA CORPORATION *et al.*,
Defendants-Appellees.

Nos. 76-3614, 76-3615, 76-3692 and 76-3738.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Nov. 8, 1978.

Decided Sept. 14, 1981.

Appeal from the United States District Court for the Northern District of California.

Before BROWNING, Chief Judge, KENNEDY, Circuit Judge, and CHRISTENSEN,* District Judge.

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*Honorable A. Sherman Christensen, Senior Judge, United States District Court for the District of Utah, sitting by designation.

BROWNING, Chief Judge:

Three questions involving application of Section 8 of the Clayton Act, 15 U.S.C. § 19, are raised on this appeal. The principal issue is whether Section 8 prohibits the same person from serving at the same time as a director of a bank and as a director of an insurance company with which the bank competes, when the competition is such that an agreement between the companies would violate the antitrust laws. A closely related issue is whether the statute prohibits interlocking directorates between a bank holding company and an insurance company, when the only competition is between the holding company's bank subsidiary and the insurance company. Finally, we are asked to decide whether, if otherwise within the reach of Section 8, such interlocking directorates are nonetheless excluded from coverage by the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015.

The district court held Section 8 does not apply to interlocking directorates between a bank and a non-bank or between a bank holding company and non-banks. However, assuming coverage, the court held that the McCarran-Ferguson Act would not exempt bank/insurance company interlocks from the antitrust laws.

We agree with the district court that the McCarran-Ferguson Act is inapplicable, but hold that Section 8 of the Clayton Act prohibits the bank and bank holding interlocks involved here.

Section 8 contains five unnumbered paragraphs. The first three relate to interlocking personnel of member banks of the Federal Reserve System. No director, officer or employee of such a bank may serve as a director, officer, or employee of another, subject to six exceptions. The bar applies whether or not the banks compete, although banks not in adjacent cities or engaged in the same class of business are excluded. Power to enforce the prohibitions of these banking paragraphs is vested in the Board of Governors of the Federal Reserve System.

The fourth paragraph contains the provision invoked here. This "competing corporations" paragraph prohibits any person from serving as a director of any two or more corporations "other than banks, banking associations, trust companies, and common carrier" provided any one of the corporations has capital exceeding $1,000,000

and is engaged in commerce, and the corporations are or have been in such competition that an agreement between them would violate the antitrust laws. [1]

---

[1] Section 8 has been amended often. The changes do not affect this case. The present statute reads as follows:

[Para 1]

No private banker or director, officer, or employee of any member bank of the Federal Reserve System or any branch thereof shall be at the same time a director, officer, or employee of any other bank, banking association, savings bank, or trust company organized under the National Bank Act or organized under the laws of any State or of the District of Columbia, or any branch thereof, except that the Board of Governors of the Federal Reserve System may by regulation permit such service as a director, officer, or employee of not more than one other such institution or branch thereof; but the foregoing prohibition shall not apply in the case of any one or more of the following or any branch thereof:

(1) A bank, banking association, savings bank, or trust company, more than 90 per centum of the stock of which is owned directly or indirectly by the United States or by any corporation of which the United States directly or indirectly owns more than 90 per centum of the stock.

(2) A bank, banking association, savings bank, or trust company which has been placed formally in liquidation or which is in the hands of a receiver, conservator, or other official exercising similar functions.

(3) A corporation, principally engaged in international or foreign banking or banking in a dependency or insular possession of the United States which has entered into an agreement with the Board of Governors of the Federal Reserve System pursuant to sections 601 to 604a of Title 12.

(4) A bank, banking association, savings bank, or trust company, more than 50 per centum of the common stock of which is owned directly or indirectly by persons who own directly or indirectly more than 50 per centum of the common stock of such member bank.

(5) A bank, banking association, savings bank, or trust company not located and having no branch in the same city, town, or village as that in which such member bank or any branch thereof is located, or in any city, town, or village contiguous or adjacent thereto.

(6) A bank, banking association, savings bank, or trust company not engaged in a class or classes of business in which such member bank is engaged.

(7) A mutual savings bank having no capital stock.

[Para 2]

Until February 1, 1939, nothing in this section shall prohibit any director, officer, or employee of any member bank of the Federal Reserve System, or any branch thereof, who is lawfully serving at the same time as a private banker or as a director, officer, or employee of any other bank, banking association, savings bank, or trust company, or any branch thereof, on August 23, 1935, from continuing such service.

[Para 3]

The Board of Governors of the Federal Reserve System is authorized and directed to enforce compliance with this section, and to prescribe such rules and regulations as it deems necessary for that purpose.

[Para 4]

No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000 engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter.

[Para 5]

When any person elected or chosen as a director or officer or selected as an employee of any bank or other corporation subject to the provisions of this Act is eligible at the time of his election or selection to act for such bank or other corporation in such capacity his eligibility to act in such capacity shall not be affected and he shall not become or be deemed amenable to any of the provisions hereof by reason of any change in the affairs of such bank or other corporation from whatsoever cause, whether specifically excepted by any of the provisions hereof or not, until the expiration of one year from the date of his election or employment.

15 U.S.C. § 19 (1976) (emphasis added)

The first three paragraphs are relevant to this case only insofar as they shed light on the meaning of the fourth. The Board of Governors of the

Federal Reserve System regards the comprehensive Interlocks Act, 12 U.S.C. §§ 3201 *et seq.* (Supp. III 1979), as having supplanted the first three paragraphs. 12 C.F.R. § 212.7 (1980).

Section 8 as enacted contained four unnumbered paragraphs, the third of which covered competing corporations. To avoid confusion, the various paragraphs will be referred to in this opinion by subject — "the banking paragraphs" or the "competing corporations paragraph" — rather than by number. The original statute read as follows:

[Para 1]

That from and after two years from the date of the approval of this Act no person shall at the same time be a director or other officer or employee of more than one bank, banking association or trust company, organized or operating under the laws of the United States, either of which has deposits, capital, surplus, and undivided profits aggregating more than $5,000,000; and no private banker or person who is a director in any bank or trust company, organized and operating under the laws of a State, having deposits, capital, surplus, and undivided profits aggregating more than $5,000,000, shall be eligible to be a director in any bank or banking association organized or operating under the laws of the United States. The eligibility of a director, officer, or employee under the foregoing provisions shall be determined by the average amount of deposits, capital, surplus, and undivided profits as shown in the official statements of such bank, banking association, or trust company filed as provided by law during the fiscal year next preceding the date set for the annual election of directors, and when a director, officer, or employee has been elected or selected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter under said election or employment.

[Para2]

No bank, banking association or trust company, organized or operating under the laws of the United States, in any city or incorporated town or village of more than two hundred thousand inhabitants, as shown by the last preceding decennial census of the United States, shall have as a director or other officer or employee any private banker or any director or other officer or employee of any other bank, banking association or trust company located in the same place: *Provided*, That nothing in this section shall apply to mutual savings banks not having a capital stock represented by shares; *Provided further*, That a director or other officer or employee of such bank, banking association, or trust company may be a director or other officer or employee of not more than one other bank or trust company organized under the laws of the United States or any State where the entire capital stock of one is owned by stockholders in the other; *And provided further*, That nothing contained in this section shall forbid a director of class A of a Federal

This proceeding was initiated by the filing of two complaints by the United States challenging interlocking directorates held by five individuals linking three of the nation's largest banks with four of its largest insurance companies. [2]

Reserve Act, from being an officer or director or both an officer and director in one member bank.

[Para 3]

That from and after two years from the date of the approval of this Act no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared by not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter.

[Para 4]

When any person elected or chosen as a director or officer or selected as an employee of any bank or other corporation subject to the provisions of this Act is eligible at the time of his election or selection to act for such bank or other corporation in such capacity his eligibility to act in such capacity shall not be affected and he shall not become or be deemed amenable to any of the provisions hereof by reason of any change in the affairs of such bank or other corporation from whatsoever cause, whether specifically excepted by any of the provisions hereof or not, until the expiration of one year from the date of his election or employment.

Clayton Act, ch. 323 § 8, 38 Stat. 732-33 (1914).

[2] The complaint in *United States* v. *Crocker National Corp.* alleged that each of three individuals was a director of the Crocker National Corporation, Crocker National Bank, and of either the Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company or Mutual Life Insurance Company of New York. The complaint in *United States* v. *BankAmerica Corp.* alleged that a director of Bank of America National Trust and Savings Association and of its holding company, BankAmerica

The parties stipulated that each of the appellee banks "by virtue of its business and location of operations, has been and is now a competitor" of the life insurance company or companies with which it is interlocked "in the extension of mortgage and real estate loans[,] and that such competition is not insubstantial." The companies waived any defense that the elimination of this competition by agreement among them would not violate the antitrust laws. The substantial nature of the competition potentially affected is indicated by stipulations that at the beginning of 1975, outstanding real estate loans of the three banks totaled $6.5 billion and those of the four insurance companies totaled $32 billion.

As the district court noted, interlocking directorates of this kind are common — approximately 40% of the insurance company directors in the United States are also bank directors. *United States* v. *Crocker National Corp.*, 422 F.Supp. 686, 691 (N.D.Cal.1976).

Both sides moved for summary judgment. The district court granted judgment for appellees on the ground that interlocking directorates between banking and non-banking corporations were not covered by the fourth paragraph of Section 8.

We conclude that the language of the statute does not exempt interlocking directorates between competing banks and non-banks where the competition between them is such that an agreement would violate the antitrust laws, that there is no indication that Congress intended to exempt such interlocking directorates, and that to exempt

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Corporation, and a director of Bankers Trust Company and of its holding company, Bankers Trust New York Corporation, were also directors of Prudential Insurance Company. The individual serving as a director of Prudential, BankAmerica and Bank of America resigned from the boards of the bank holding company and its subsidiary bank when notified by the government of its intent to file suit. After the filing of the complaint, the individual serving as a director of Crocker National Corporation, Crocker National Bank, and Equitable Life agreed to a consent judgment requiring that he resign his directorship in the bank and bank holding company or in Equitable Life.

them would be contrary to Congress's purpose in enacting the Clayton Act as a whole and Section 8 in particular. [3]

I.

Appellees' primary argument, and the principal ground of decision below, is that the language of Section 8 clearly and unambiguously exempts from the bar of the statute all interlocking directorates between banks and non-banks regardless of the competition between them.

Appellees interpret the language of the exclusionary clause ("in any two or more corporations . . . other than banks, banking associations, trust companies, and common carriers") to mean "two or more corporations . . . [*none of which is]* a bank, banking association, trust company or common carrier." On its face, however, the language may be read with equal plausibility as meaning "two or more corporations . . . [*not all of which are* banks, banking associations, trust companies and common carriers."

The meaning remains equivocal if the context of the clause is considered. Parsing the paragraph, the district court identified four limiting clauses and concluded that a parallel construction of three of them would support the inference that the "other than" clause applies to both interlocked corporations. [4] This construction would exclude

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[3] On cross-appeal, appellees argue that Section 8 applies only to individual directors and not to corporations. The Supreme Court has left this question unresolved. *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 634 n.9, 73 S.Ct. 894, 898 n.9, 97 L.Ed. 1303 (1953). The Second Circuit has construed the section as covering both corporations and individuals, *SCM Corp.* v. *Federal Trade Commission*, 565 F.2d 807, 811 (2d Cir. 1977). We need not reach the question. As the district court noted, and as conceded below, the district court had the power under Section 15 of the Clayton Act, 15 U.S.C. § 25, to enjoin the corporations as a means of shaping appropriate relief against violations by individuals. *United States* v. *Crocker National Corp.*, 422 F.Supp. 686, 705-06 (N.D.Cal.1976).

[4] The district court said:

[I]t is readily apparent to the court, that all of the four limiting clauses apply to both corporations involved in an interlock, except for the first clause which by its own specific terms may be satisfied by "any one of" the two

interlocking directorates between competing banks and non-banks from Section 8 entirely. As others have observed,[5] however, when the section is read as a whole the exemption of "banks, banking associations, trust companies" in the competing corporations paragraph appears to relate back to the immediately preceding paragraphs regulating interlocking personnel between a bank and "any other bank, banking association, savings bank, or trust company." Since the banking paragraphs apply only to interlocking personnel between two or more banks, a normal reading would attribute the same meaning to the phrase in the competing corporations paragraph. This construction would exclude from the competing corporations paragraph only interlocking directorates between banks governed by the banking paragraphs. Section 8 as a whole would then cover all horizontal interlocks.

As will be seen, the latter interpretation is supported by the circumstances in which the "other than banks" clause was added to the statute.[6] At this point, however, it is sufficient to conclude that the exclusionary clause in the competing corporations paragraph of Section 8 is not so clear and unequivocal, either alone or in context, as to make resort to the legislative history unnecessary.

Before turning to the history of Section 8, reference should be made to Section 10, dealing with common carriers. Section 10 replaced a provision originally found in Section 8. Section 10 regulates transactions between a common carrier and another business entity relating to supplies, construction, and maintenance or to the distribution of the carrier's securities. It does not bar personnel

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interlocked corporations. Hence, it is clear then that both interlocked corporations must satisfy clause 2 — that is, they must both be engaged in whole or in part in commerce; that both corporations must satisfy clause 4 — that is, they must be competitors; and finally and most significantly, that both corporations must satisfy clause 3 — that is, they must both be other than banks, banking associations, trust companies and common carriers.

422 F.Supp. 686, 690 (N.D.Cal.1976).

[5] *See, e.g., In re* Perpetual Federal Savings & Loan Ass'n, 90 F.T.C. 608, 636-37 (1977), *vacated on other grounds*, 94 F.T.C. 401 (1979).

[6] *See* Par II *infra*.

interlocks between the carrier and the other party to the transaction, but provides that if such interlocks exist the transaction must be based upon the competitive bid most favorable to the carrier.[7]

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[7] *See* text accompanying note 46. Section 10 reads in full:

That after two years from the approval of this Act no common carrier engaged in commerce shall have any dealings in securities, supplies or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than $50,000, in the aggregate, in any one year, with another corporation, firm, partnership or association when the said common carrier shall have upon its board of directors or as its president, manager or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.

Any person who shall, directly or indirectly, do or attempt to do anything to prevent anyone from bidding or shall do any act to prevent free and fair competition among the bidders or those desiring to bid shall be punished as prescribed in this section in the case of an officer or director.

Every such common carrier having such transactions or making any such purchases shall within thirty days after making the same file with the Interstate Commerce Commission a full and detailed statement of the transaction showing the manner of the competitive bidding, who were the bidders, and the names and addresses of the directors and officers of the corporations and the members of the firm or partnership bidding; and whenever the said commission shall, after investigation or hearing, have reason to believe that the law has been violated in and about the said purchases or transactions it shall transmit all papers and documents and its own views or findings regarding the transaction to the Attorney General.

If any common carrier shall violate this section it shall be fined not exceeding $25,000; and every such director, agent, manager or officer thereof who shall have knowingly voted for or directed the act constituting such violation or who shall have aided or abetted in such violation shall be deemed guilty of a misdemeanor and shall be fined not exceeding $5,000, or confined in jail not exceeding one year, or both, in the discretion of the court.

II.

The applicability of the competing corporations paragraph of Section 8 to interlocking directorates between competing banks and non-banks was not clearly addressed by Congress. Possible references to the subject, discovered by the parties in an exhaustive examination of the legislative materials, are in themselves ambiguous. [8] The scope of the statute must be determined from less direct evidence; "[s]tatutory language should be construed in accordance with its underlying purpose." *TRW, Inc.* v. *F.T.C.*, 647 F.2d 942, at 946 (9th Cir. 1981). Therefore, we must "look to the 'object and policy of the law.' " *Stafford* v. *Briggs*, 444 U.S. 527, 536, 100 S.Ct. 774, 780, 63 L.Ed.2d 1 (1980) (citation omitted).

After two decades of experience under the Sherman Act it was widely felt among persons interested in such matters that the Act had failed to accomplish its objectives. [9] The Clayton Act was proposed to supplement the Sherman Act and remedy its perceived deficiencies. [10] The Act condemned certain practices not clearly barred by the Sherman Act that were believed to threaten free competition and lead to monopoly. [11]

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[8] *See* notes 48-59 and accompanying text.

[9] Jones, *Historical Development of the Law of Business Competition*, 36 Yale L.J. 351, 376-77 (1927).

[10] *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 355, 42 S.Ct. 360, 362, 66 L.Ed. 653 (1922); *United Shoe Machinery Corp.* v. *U.S.*, 258 U.S. 451, 460, 42 S.Ct. 363, 366, 66 L.Ed. 708 (1922); *United States* v. *E. I. Du Pont De Nemours & Co.*, 353 U.S. 586, 597, 77 S.Ct. 872, 879, 1 L.Ed.2d 1057 (1957); E. Kintner, *Legislative History of the Federal Antitrust Laws and Related Statutes* 989 (1978).

[11] The theory of the Clayton Act was stated in the report of the Judiciary Committee of the Senate:

It is not proposed by the bill or amendments to alter, amend, or change in any respect the original Sherman Antitrust Act of July 2, 1890. The purpose is only to supplement that act and the other antitrust acts referred to in section 1 of the bill. Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and made unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890, or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their

Interlocking directorates were of particular concern. The Democratic platform of 1908 called for abolition of interlocking directorates between competing corporations; the 1912 platform urged prohibition of all interlocking directorates.[12] Woodrow Wilson emphasized the issue in his successful campaign for the Presidency.[13] Shortly before Mr. Wilson's inauguration, a congressional report recommended that "interlocking directorates in potentially competing financial institutions be abolished and prohibited."[14] In his Inaugural Address President Wilson asserted that "all agreed that 'private monopoly is indefensible and intolerable,' " and called

> for laws which will effectually prohibit and prevent such interlockings of the *personnel* of the directorates of great corporations — banks and railroads, industrial, commercial, and public-service bodies — as in effect result in making those who borrow and those who lend practically one and the same, those who sell and those who buy but the same persons trading with one another under different names and in different combina-

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incipiency and before consummation. Among other of these trade practices which are denounced and made unlawful may be mentioned discrimination in prices for the purpose of wrongfully injuring or destroying the business of competitors; exclusive and tying contracts; holding companies; and interlocking directorates.

S.Rep.No.698, 63d Cong., 2d Sess. 1 (1914). *See also Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 356, 42 S.Ct. 360, 362, 66 L.Ed. 653 (1922); *SCM Corp.* v. *Federal Trade Coimmission*, 565 F.2d 807, 811 (2d Cir. 1977); *United States* v. *Sears, Roebuck & Co.*, 111 F.Supp. 614, 616 (S.D.N.Y.1953) (Weinfeld, J.); *In re Perpetual Federal Savngs & Loan Ass'n*, *supra*, 90 F.T.C. at 653-65; Jones, *supra* note 9, at 376-77.

[12] K. Porter & D. Johnson, *National Party Platforms, 1840-1964* 146, 169 (1966).

[13] Travers, *Interlocks in Corporate Management and the Antitrust Laws*, 46 Texas L.Rev. 819, 827 (1968).

[14] *Concentration of Control of Money and Credit*, H.R.Rep.No.1593, 62d Cong., 3d Sess. 140 (1913) ("Pujo Report"). *See also Investigation of United States Steel Corp.*, H.R.Rep.No.1127, 62d Cong., 2d Sess. 209-10 (1912) ("Stanley Report").

> tions, and *those who affect to compete in fact partners and masters of some whole field of business.* [15]

Representative Clayton, Chairman of the Committee on the Judiciary, embodied the President's requests in proposed legislation dealing with interlocking directorates in three overlapping categories. The first dealt with carrier and public service corporations, their suppliers, and banks. The second dealt with banks, prohibiting service as a director of two or more federal reserve banks. The third dealt with competing corporations. Common directors were "conclusive evidence" that there was no competition between the corporations having common directors, and if such corporations were or have been "natural competitors," a violation of the Sherman Act was "conclusively presumed." [16] No class of corporation was excluded.

After extensive hearings before the Judiciary Committee, Rep. Clayton introduced revised bill, H.R. 15657. Section 8 contained the provisions regarding interlocking directorates. As the bill emerged from the Committee, the prohibition against interlocks between carriers and their suppliers and banks remained essentially as in the tentative bill. The prohibition against interlocks between banks was also essentially unchanged, but was made applicable only when one of the interlocked banks had deposits, capital, surplus, or undisclosed profits of more than $2,500,000 or when both banks were located in the same city. The prohibition against competitor interlocks took its present form (including the limitation of corporations having capital, surplus, or undisclosed profits of $1,000,000) except that the exclusionary clause was confined to "other than common carriers." [17]

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[15] As quoted in H.R.Rep.No.627, Pt. 1, 63d Cong., 2d Sess. 17-18 (first emphasis in original; second emphasis added).

[16] Tentative Bill by Mr. Clayton, 63d Cong., 2d Sess. (No. 3 — Committee Print) *reprinted* in E. Kintner, *supra* note 10, at 1077-78.

[17] H.R.15657 as Reported by the House Committee on the Judiciary, 63d Cong. 2d Sess., May 6, 1914, *reprinted* in E. Kintner, *supra* note 10, at 1163-81. As restructured by the Committee, the interlocking directorate provisions became Section 9. Although what is now Section 8 was numbered Section 9 throughout most of the legislative consideration, it is referred to throughout this opinion as Section 8.

In reporting the bill the House Judiciary Committee quoted President Wilson's condemnation of interlocking directorates and stated that the Committee had "endeavored to carry out the recommendation of the President." [18] The Committee's Report spelled out the purposes behind the bill's three substantive prohibitions. The provisions of the first were designed to "prevent absolutely common directors or interlocking directors between corporations occupying relations to each other described therein," [19] that is, vertical relations between a carrier and its suppliers, and between a carrier and banks dealing in its securities. The purpose of the second prohibition, barring interlocking personnel between banks with more than $2,500,000 capital, "is to prevent as far as possible control of great aggregations of money and capital . . . to prevent the concentration of money or its distribution through a system of interlocking directorates." [20]

The purpose of the paragraph barring interlocking directorates between competing corporations was strongly stated:

> The concentration of wealth, money, and property in the United States under the control and in the hands of a few individuals or great corporations has grown to such an enormous extent that unless checked it will ultimately threaten the perpetuity of our institutions. . . . The truth is that the only real service the same director in a great number of corporations renders is in maintaining uniform policies throughout the entire system for which he acts, which usually results to the advantage of the greater corporations and to the disadvantage of the smaller corporations which he dominates by reason of his prestige as a director and to the detriment of the public generally. [21]

The emphasis upon the importance of the prohibition against the sharing of common directors by large competing corporations is understandable. The central purpose of the Clayton Act was to supplement the Sherman Act. [22] The central purpose of the Sherman

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[18] H.R.Rep.No.627 at 18.

[19] *Id.*

[20] *Id.* at 19.

[21] *Id.* at 19-20.

[22] *See* note 10 and accompanying text.

Act was "preserving free and unfettered competition as the rule of trade." *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 4, 78 S.Ct. 514, 517, 2 L.Ed.2d 545 (1958). As the Judiciary Committee pointed out, common directors perform the function of "maintaining uniform policies" among the corporations they serve. The initial formulation of the bar against interlocking directorates between competing corporations rested on the premise that elimination of the competition between the corporations was to be presumed from the very existence of common directors. This remained the essence of the prohibition. Interlocking arrangements between competing corporations threaten the basic purpose of the Sherman Act and are therefore treated as illegal *per se*.[23]

Even the minority of the Judiciary Committee recognized that the prohibition of interlocking directorates between competing corporations "comes measurably closer to the principle of the Sherman Act than any of the preceding provisions relating to interlocking directorates."[24] Recent analysis supports the assumption upon which this provision of the Clayton Act rests: a direct interlock between competitors "seems intended solely to suppress competition. No legitimate reason for the sharing of directors by competitors appears."[25]

There was little debate in the House on the provisions relating to interlocking directorates. The need for regulation was widely accepted and the proposed prohibitions relatively non-controversial. What comments there were referred mainly in broad terms to the evils arising from such arrangements — "so well known as to be commonly

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[23] *TRW*, *supra* at 947; *United States* v. *Sears, Roebuck & Co.*, 111 F.Supp. 614, 616-17 (S.D.N.Y.1953).

[24] H.R.Rep.No.627, Pt. 2 at 8 (minority views).

[25] Travers, *supra* note 13, at 843-44. *See also* Note, *Clayton Act Prohibition of Interlocking Directorates in Industrial or Commercial Corporations*, 54 Colum.L.Rev. 130, 131 (1954); *Report of the Federal Trade Commission on Interlocking Directorates*, H.R.Doc.No.652, 81st Cong., 2d Sess. 10 (1951) ("[B]ased on the practical certainty that an interlocking directorate between competitors had an adverse effect upon competition, [Section 8] does not require for its enforcement any proof that in the particular instance the expected effect actually exists.").

understood" —[26] and the desirability of abolishing them.[27] The accepted principle was that "[t]here can be no real competition between companies engaged in commerce where the same persons control the policies of the different companies."[28]

Substantial changes were made in the Senate. None of them, however, were attributable to any difference in view with the House as to the evil of interlocking directorates among large competing corporations and the purpose of Congress to bar them. What the Senate said and did reflected its concurrence in the view of the House on these issues.

The Report of the Senate Committee on the Judiciary stated that the theory and scope of the bill as it passed the House was unchanged — that its purpose was to supplement the Sherman Antitrust Act and, by prohibiting certain trade practices, "to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation." Among the trade practices "denounced and made unlawful" were "interlocking directorates."[29] The Senate Committee adopted verbatim the analysis of the House Judiciary Committee in recommending passage.

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[26] 51 Cong.Rec. 9091 (1914) (remarks of Rep. Mitchell).

[27] *See id.* (remarks of Rep. Mitchell); *id.* at 9181 (Rep. Byrnes); 9186 (Rep. Helvering); 9261 (Rep. McGillicuddy); 9271 (Rep. Carlin); 9541 (Rep. Henry); 9554 (Rep. Barkley); 9576 (Rep. Carr); 9600-02, 9605-06 (various Representatives). But *see id.* at 9085 (remarks of Rep. Madden opposing the prohibition).

The only amendments to the interlock proposals offered in the house (other than a minor change in the civil penalty) related to the bar against interlocking relationships between banks, and reflected a minority view that such relationships between small banks in local communities should not be prohibited. These amendments were defeated, 51 Cong.Rec. 9600-07. However, the basic objective was achieved in Conference by increasing to $5,000,000 the amount of deposits, capital, surplus, and undivided profits one of the banks must hold before the prohibition applies. *See* notes 44-45 and accompanying text.

[28] 51 Cong.Rec. 9554 (1914) (remarks of Rep. Barkley).

[29] S.Rep.No.698, 63d Cong., 2d Sess. 1 (1914), *quoted* at note 11 *supra*.

The Senate Committee did propose significant changes in the treatment of vertical interlocks among carriers, their suppliers, and the banks that handled their security issues; and in the treatment of horizontal interlocks between banks. With respect to the former, the Committee stated, "especially in the case of railroads, emergencies may arise when absolutely prohibitory law against such dealings would be most injurious to the public."[30] The Committee recommended substitution of a provision allowing interlocks but requiring competitive bidding under the supervision of the Interstate Commerce Commission. The Committee also recommended that the paragraph in the House bill relating to interlocks between banks be stricken, and that "such additional regulation of bank directorates as may be wise and just should be made by amendments to the national bank acts, and the enforcement of it given to the Comptroller of the Currency and the Federal Reserve Board."[31]

The Committee report recommended no tempering of the bar against interlocks between large competing corporations. Such interlocks were strongly condemned during floor debate. Speaking for the Committee, Senator Shields stated that "[t]he object of this whole section, Mr. President, is to prevent the common and well-known evil of interlocking directorates, and thus a practical combination of different corporations engaged in commerce, which inevitably results in restraint of trade and monopoly."[32] Arguing that the prohibition was too weak, Senator Cummins described the interlocking directorates between competing corporations as a practice "we all recognize as a vicious one, as one which insidiously destroys the reasonable rivalry and independence that ought to exist . . ."[33]

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[30] *Id.* at 48.

[31] *Id.* Appellees argue the Senate's reasoning shows that the portions the Senate left intact — in particular the competing corporations paragraph — were not intended to reach bank/non-bank interlocks. This argument reads too much into the Senate's action. The position that bank/bank interlocks should be regulated by a banking bill does not necessarily entail the belief that interlocks between a non-bank and a bank should be so treated — half the subject matter of such interlocks is in the "commercial" realm.

[32] 51 Cong.Rec. 14320 (1914).

[33] *Id.* at 14535.

The provisions relating to interlocking directorates recommended by the Committee were adopted by the Senate.

To resolve differences between House and Senate, a Conference Committee agreed upon three changes in the Senate provisions. The bar against interlocking directorates between banks was restored, but the minimum population of cities in which bank interlocks were barred without regard to size was raised from 100,000 to 200,000, and the minimum capital required before the prohibition applied elsewhere was raised from $2,500,000 to $5,000,000. The exclusionary clause in the provision barring interlocks between competing corporations was changed from "other than common carriers" to "other than banks, banking associations, trust companies and common carriers." Finally, the provision requiring competitive bidding in transactions between common carriers and their suppliers was removed from Section 8 and placed in a separate section.

The report of the Conference Committee gave no reason for the changes. However, nothing in the debate leading to the adoption of the Committee report suggests any retreat by Congress from the view that interlocking directorates between large competing corporations were contrary to the public interest and should be condemned.

In sum, the legislative materials establish that the Clayton Act was intended to supplement and strengthen the Sherman Act in preserving a free competitive economy; that interlocking directorates between large competing corporations were regarded as a precursor to restraint and monopoly and thus as a most serious threat to free competition; and that such interlocking directorates were strongly condemned. As Judge Weinfeld has said:

> [T]he broad purposes of Congress are unmistakably clear. Section 8 was . . . intended to strengthen the Sherman Act, which, through the years, had not proved entirely effective. . . . Interlocking directorships on rival corporations had been the instrumentality of defeating the purpose of the antitrust laws. They had tended to suppress competition or to foster joint action against third party competitors. The continued potential threat to the competitive system resulting from these conflicting directorships was the evil aimed at. Viewed against this background, a fair reading of the legislative debates leaves little room for

> doubt that, in its efforts to strengthen the antitrust laws, what Congress intended by § 8 was to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates. . . .[34]

The Federal Trade Commission has arrived at the same conclusion:

> Section 8 of the Clayton Act, 15 U.S.C. 19, clearly enunciates a strong Congressional policy disfavoring interlocking directorates. . . .
>
> Congress enacted the Clayton Act . . . in response to the perceived shortcomings of the Sherman Act, as interpreted by the courts, in abating what were seen as unhealthy concentrations of economic and political power. One of the practices which was singled out for particular concern was the interlocking directorate. . . .
>
> That Congress, in enacting Section 8, intended to outlaw interlocks between substantial competitors is unmistakable . . . .[35]

Interpreting the ban of the competing corporations paragraph of Section 8 to apply to interlocking directorates between large competing banks and insurance companies would thus further the unmistakable general purpose of Congress.

III.

This interpretation is also favored by the "governing statutory presumptions." *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 732, 93 S.Ct. 1773, 1778, 36 L.Ed.2d 620 (1973).

Section 8 is a remedial provision. It must be liberally construed to accomplish its prophylactic purpose.[36] The interpretive standard the Supreme Court applied to the Robinson-Patman amendments in *FTC*

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[34] *United States* v. *Sears, Roebuck & Co.*, 111 F.Supp. 614, 616 (S.D.N.Y.1953). *See TRW, supra*, at 946.

[35] *In re Perpetual Federal Savings & Loan Ass'n, supra*, 90 F.T.C. at 652-54.

[36] *SCM Corp.* v. *FTC*, 565 F.2d 807, 811 (2d Cir. 1977).

v. *Fred Meyer, Inc.*, 390 U.S. 341, 349, 88 S.Ct. 904, 908, 19 L.Ed.2d 1222 (1968), is equally applicable here: conceding the language of the statute to be unclear, "we cannot, in the absence of an unmistakable directive, construe the Act in a manner which runs counter to the broad goals which Congress intended it to effectuate." Removing bank/non-bank interlocks from the scope of the competing corporations paragraph would run counter to Congress' broad goal of maintaining a free competitive economy by barring interlocking directorates between large competing corporations. Such a result would also run counter to Congress' purpose of inhibiting the concentration of control over money and capital by enacting the banking paragraphs prohibiting interlocking directorates between financial institutions. [37] Interlocking directorates between banks and interlocking directorates between competing non-banks would be barred, but interlocking directorates between competing banks and non-banks would not be, even though they would offend the Congressional purpose underlying not only one of the prohibitions, but the purpose underlying both.

Such an interpretation would also be inconsistent with the settled canon of construction that " '[i]mmunity from the antitrust laws is not lightly implied,' " a principle "which reflects the felt indispensable role of antitrust policy in the maintenance of a free economy." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348, 83 S.Ct. 1715, 1733, 10 L.Ed.2d 915 (1963) (citations omitted). We must apply the doctrine that "the antitrust laws . . . are to be construed liberally and . . . the exceptions from their applications are to be construed strictly." *Abbott Laboratories* v. *Portland Retail Druggists Ass'n., Inc.*, 425 U.S. 1, 11, 96 S.Ct. 1305, 1313, 47 L.Ed.2d 537 (1976). "This doctrine is not limited to implicit exemptions from the antitrust laws, but applies with equal force to express statutory exemptions." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231, 99 S.Ct. 1067, 1083, 59 L.Ed.2d 261 (1979). A liberal construction of the competing corporations paragraph includes interlocking directorates between competing banks and non-banking corporations within its bar; a strict construction of the exception

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[37] *See* note 20 and accompanying text.

confines the "other than banks" exclusionary language to directorates between banks.

To avoid this conclusion appellees argue that the exclusionary clause is not an exception to a general antitrust prohibition embodied in the competing corporations paragraph. Instead, they contend, Sections 8 and 10 together reflect a "highly selective" regulatory scheme to prohibit some interlocking directorates and permit others. As has been seen, however, the language of the competing corporations paragraph, the climate of opinion out of which it grew, and the legislative history of the provisions, all reflect a purpose, based upon specific and clearly articulated policy considerations, to condemn interlocking directorates among large competing corporations generally subject only to the specific exemptions stated in the statute.[38] As the Federal Trade Commission has said, "[N]owhere . . . is there any indication that Congress carefully considered interlocks between banks and *competing* non-banks, and made a conscious decision to immunize such arrangements while generally condemning other horizontal interlocks."[39] There is no statement in the legislative history of a specific intention to exclude such interlocks; there is no expression of any purpose such an exclusion might have served. It is therefore appropriate to regard Section 8's prohibition against interlocking directorates between large competing corporations as a legislative embodiment of the fundamental national policy favoring a free competitive economy, and the "other than banks . . . and common carriers" clause as an express exception to that policy, which, nar-

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[38] *See* Part II *supra*.

[39] *In re Perpetual Federal Savings & Loan Ass'n, supra*, 90 F.T.C. at 656. Summarizing Congress' general approach to interlocking directorates, the Commission said:

> What emerges from the mosaic of federal anti-interlock statutes, foremost among which is Section 8, is a clear antipathy toward interlocking directorates. An examination of these statutes, summarized in respondent's brief, . . . reveals a general prohibition against horizontal interlocks except to the extent expressly permitted by statute or expressly made subject to federal regulation.

Id.

rowly construed, does not immunize the interlocks in this case from the general bar. [40]

As noted at the outset, this construction is supported by the statute's language and structure. [41] A normal reading of Section 8 leads to the conclusion that the exclusionary clause was intended to coordinate the provisions of Section 8 relating to horizontal interlocking directorates by removing interlocks between banks from the competing corporations paragraph because such interlocks were regulated by the preceding paragraphs. The legislative history, supports this conclusion as to the function of the exclusionary clause.

As we have noted, the Senate struck the provision relating to bank interlocks. It was restored by the Conference Committee which at the same time added banks to the exclusionary clause in the competing corporations paragraph. [42] The district court concluded that these changes reflected a compromise agreement to restore the bar to interlocks between banks in return for the complete exemption of banks from the bar against interlocks between competing corporations. [43] There is nothing other than an inference from the changes themselves to support the court's theory, and the result, as we have seen, is contrary to Congress' objectives.

There is an alternative explanation that is fully consistent both with the changes made and with Congress' basic purpose. It will be remembered that in addition to the changes mentioned, the Conference Committee made two changes in the bank provisions designed to limit the applicability of the bar against bank interlocks: the minimum capital was raised from $2,500,000 to $5,000,000; the size of cities in which interlocks were barred without respect to the size of the banks

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[40] *See generally United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348, 83 S.Ct. 1715, 1733, 10 L.Ed.2d 915 (1963); *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797, 808-10, 65 S.Ct. 1533, 1539-40, 89 L.Ed. 1939 (1945); *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553-61, 64 S.Ct. 1162, 1173-78, 88 L.Ed. 1440 (1944).

[41] *See* note 5 and accompanying text.

[42] *See* notes 31-33 and accompanying text.

[43] 422 F.Supp. at 700.

was raised from 100,000 to 200,000. The obvious inference is that it was this restriction of the applicability of the bar against inter-bank interlocks, and not the total exclusion of banks from the competing corporations paragraph, that induced the Senate to agree to a restoration of that bar against inter-bank interlocks.

There was also a clear reason other than total exemption for adding banks to the exclusionary clause. A proposal to raise the threshold for applicability of the competing corporations provision from a minimum capital of $1,000,000 to a minimum of $5,000,000 was not adopted. [44] Thus the competing corporations paragraph was applicable to corporations of much less substantial size ($1,000,000) than the restored bank interlock prohibitions ($5,000,000), and contained no population requirement at all. Moreover, the restored provision barring inter-bank interlocks contained a series of exceptions not applicable to the bar against interlocks between competing corporations. Thus interlocks between competing banks that were not barred by the banking paragraphs might nonetheless have been barred by the competing corporations paragraph unless specifically excluded from the latter. As the House Conferees informed the House, the addition of banks to the exclusionary clause accomplished this purpose and thus protected the compromise agreement between the House and the Senate. [45]

Under this construction of the reference to banks in the exclusionary clause, banks are exempt from the competing corporations paragraph's bar against interlocks between large competing corporations only to the extent necessary to permit the provision regarding interlocks between banks in the banking paragraphs to be fully effective. To go farther, and wholly exclude banks from the general prohibition of the competing corporations paragraph, would be both unnecessary and contrary to Congress' general purpose.

Appellees resist this interpretation on the ground that the reference in the exclusionary clause to banks must be given the same effect as the reference to common carriers, and that the effect of the reference

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[44] 51 Cong.Rec. 14321.

[45] *Id.* at 16271-72.

to common carriers is to exclude carriers from the competing corporations paragraph entirely. But the references in the exclusionary clause to banks and common carriers do not have a common origin. There is no basis for the assumption that they are to be read in the same way. They entered the exclusionary clause at different times and involve different considerations; there is no reason they should not have different effects. The reference to banks was inserted in the exclusionary clause late in the legislative process. The circumstances suggest a purpose to avoid inconsistent regulation of interlocks between banks. This specific purpose is entirely satisfied, and Congress' general purpose to maintain competition and limit the concentration of capital is equally served, by an interpretation that restricts the effect of the bank reference to exclusion from the competing corporations paragraph of inter-bank interlocks only.

An exclusionary clause applicable to carriers, on the other hand, was included in H.R. 15657 as this bill was filed. The substantive provisions of the bill relating to carriers had a different purpose and took a different form than the substantive provisions relating to banks and competing corporations. The purpose of Section 10, the carrier provision, was to protect carriers from overreaching and conflicts of interest.[46] The statute does not seek to accomplish this purpose by barring interlocking directorates between carriers and corporations engaged in furnishing them with supplies or in distributing their securities, but by requiring competitive bidding when such interlocks exist.

Appellees argue that this provision implicitly approves interlocks that might be barred by the competing corporations paragraph, and that to avoid possible inconsistency between Section 10 and the competing corporations paragraph of Section 8, exclusion of carrier interlocks from the competing corporations paragraph must be total. We need not decide that question.

It is evident, in any event, that Congress chose to deal with banks and carriers differently, that the reference to the two types of corpora-

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[46] *See* S.Rep.No.698, 63d Cong., 2d Sess. 47-48 (1914); *Minneapolis & St. Louis Ry.* v. *United States*, 361 U.S. 173, 190, 80 S.Ct. 229, 239, 4 L.Ed.2d 223 (1959).

tions in the exclusionary clause have different purposes and different histories, and that each must be interpreted in light of the different considerations applicable to it. It is alone sufficient to justify different interpretation of the two references that the principal consideration requiring a restrictive reading of the bank exemption does not apply to the exclusion of carriers: Congress did not evidence a general antipathy toward interlocks between carriers and those with whom they did business that would be furthered by confining the common carrier exception within narrow limits. With respect to interlocks with banks, as has been seen, such antipathy was clear.

IV.

Appellees contend that a number of circumstances reflect a Congressional intention to exclude interlocking directorates between competing banks and non-banks from the bar of the statute. None of the circumstances relied upon points directly to that construction; some more strongly support the contrary interpretation; most are simply ambiguous. Cumulatively they fall far short of the "unmistakable directive" [47] required to justify a construction of the competing corporations paragraph in a manner so inconsistent with the broad goals Congress intended to achieve. A brief consideration of these circumstances follows.

Appellees argue that the testimony of two notable witnesses before the House Judiciary Committee, Louis Brandeis and Samuel Untermyer, reflect the opinion that interlocking directorates between competing banks and insurance companies are not within the statute. The testimony was directed to the statute's role in eliminating conflicts of interest. [48] and to the question of coverage of insurance companies by the banking provisions. [49] It implies no view as to the scope of the competing corporations provision and therefore no view as to inter-

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[47] *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349, 88 S.Ct. 904, 908, 19 L.Ed.2d 1222 (1968). *See* text following note 36.

[48] Hearings on Trust Legislation Before the House Committee on the Judiciary, 63d Cong., 2d Sess. 681-82 (1914).

[49] *Id.* at 823, 922-26.

locks between banks and insurance companies that compete with one another.

Appellees argue that the structure of the statute reflects a "tight compartmentalization" of mutually exclusive provisions relating to common carriers, banks, and industrial corporations, and therefore banks and insurance companies would not be covered under the same provision. They rely upon a statement in the House Judiciary Committee's report that "[t]his section is divided into three paragraphs, each of which relates to the particular corporations described, and the provisions of each paragraph are limited in their application to the corporations belonging to the class named therein." [50] They also rely on references in this report and elsewhere identifying the competing corporations provision as a provision relating to "industrial corporations." [51]

The bill to which the Committee report referred was not "compartmentalized" in the rigid sense appellees suggest. The "common carrier" paragraph did not apply to common carriers alone. It barred interlocks between a carrier and "any other corporations" selling or leasing supplies to the carrier, and to any "partnership, or bank, or trust company" involved in underwriting, selling, or disposing of issues of the carrier's securities. [52] It thus expressly applied to banks, although the paragraphs barring interlocking directors between banks obviously applied to banks as well.

The use by some Congressmen of the term "industrial corporations provision" was simply a short-hand means of identifying the provision relating to competing corporations. It is not a key to the provision's scope. Appellees would not contend that large corporations competing in retail distribution, for example, would not be within the competing corporations paragraph. The term "industrial corporations" does not appear at all in the statute — the paragraph in question applies to "any two or more corporations" which are or have been

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[50] H.R.Rep.No.627, Pt. 1, 63d Cong., 2d Sess. 18 (1914).

[51] *Id.* at 19; Trust Hearings, *supra* note 48, at 830, 834, 836; S.Rep.No.698, 63d Cong., 2d Sess. 47 (1914); 51 Cong.Rec. 9604 (1914).

[52] H.R.Rep.No.627 at 18.

"competitors, so that an elimination of competition by agreement between them would constitute a violation of any of the antitrust laws." No doubt the primary impact of the provision was expected to be upon corporations competing with each other in industrial activity. Examples of interlocks among such corporations were prominent in discussions of the evils sought to be remedied. [53] Banks, on the other hand, were not generally thought of as competing with businesses other than banks. Indeed, some may have believed the competing corporations provision would not apply to banks for jurisdictional reasons — it applied only to corporations "engaged in [interstate or foreign] commerce," and it was not settled that banking could be regulated by Congress under the Commerce Clause. [54] Even if such assumptions were generally entertained, however, they would not evidence an affirmative intention that banks should be exempt from the general prohibition of interlocking directorates between large competing corporations even if, in fact, they did compete with non-bank corporations and if, in law, they were considered to be engaged in "commerce." [55]

Appellees point to a statement by Representative Cullop during floor debate that the concluding sentence of the competing corporations paragraph "does not relate to banking. That relates to industrial and commercial corporations, or institutions of that kind, but has no reference whatever to the banking business." [56] However, the subject under debate was not the bar against interlocks between competing corporations, but the bar against inter-bank interlocks. Representative Cullop was making the point that the concluding sentence of the paragraph relating to competing corporations did not provide an escape from the provisions relating to inter-bank interlocks. The

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[53] *See, e.g.*, 51 Cong.Rec. 9186 (remarks of Rep. Helvering); 9554 (Rep. Barkley); 14536 (Sen. Cummings).

[54] *See, e.g.*, Hearings on Trust Legislation Before the House Comm. on the Judiciary, 63d Cong., 2d Sess. 834 (1914) (testimony of Mr. Untermyer that banks do not engage in interstate commerce). *See also* note 58 *infra*.

[55] *See United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553-561, 64 S.Ct. 1162, 1173-1178, 88 L.Ed. 1440 (1944); *Transamerica Corp.* v. *Board of Governors*, 206 F.2d 163, 166 (3d Cir. 1953).

[56] 51 Cong.Rec. 9604 (1914).

reference to the scope of the provisions relating to competing corporations is thus both incidental and ambiguous, and affords an unreliable guide to the provision's meaning.

Similarly, a statement by Representative Carlin that "we apply an entirely different rule to the industrial corporations" was made in response to a question as to whether the banking provisions' exception for small banks applied as well to industrial corporations. [57] The irrelevance of the banking exceptions to industrial competitors has no bearing on whether the "entirely different rule" of the competing corporations provision applies to banks that qualify under its competition clause.

Appellees attach great significance to an exchange on the House floor during the debate on the report of the Conference Committee. This appears to be the only occasion during the legislative proceedings in which the question of whether the exclusionary clause exempts interlocks between competing banks and non-banking corporations from the scope of the competing corporations paragraph was clearly raised. Representative Mann stated that the inclusion of banks in the exclusionary clause had this effect. Representative Mann, however, was an opponent of the result he read into the statute, and the proponents of the statute had no opportunity to respond. [58] In these

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[57] *Id.* at 9272.

[58] Representative Mann raised a point of order against the Conference Report arguing that because the House and Senate had not disagreed as to the competing corporations paragraph of Section 8, the conferees were without authority to make substantive changes in the text and therefore had exceeded their authority by agreeing to amend the exclusionary clause to include banks. 31 Cong.Rec. 16270-72. The conferees responded by explaining that the purpose of the insertion was to make it clear that the competing corporations paragraph did not apply to the bank interlocks expressly dealt with in the preceding paragraphs. They argued that the amendment was only technical and worked no substantive change because the statute would have been interpreted in the same way without the insertion. Representative Webb, a House conferee, said:

The conference did put in "banks and banking associations," in order to make perfectly clear what in my opinion is already clear; because in the preceding paragraph we had passed a section with reference to interlocking directorates of banks, and there we made the limitation $5,000,000. Now, it

would be idiotic to say that we included also banks and banking associations in the paragraph referring to industrial corporations; and in order to make the paragraph perfectly plain, we inserted "other than banks and banks [sic] associations," and common carriers, which had no effect upon the meaning of that section . . . [I]f you will read the section preceding [paragraph four], in which we take care of banks and make the limitation $5,000,000, [you] can never conclude, even though the words which [Mr. Mann] excepts to are stricken out, that the interlocking directorates provision with reference to industrials was also intended to cover banks, because we have already taken care of banks in a former section or a former paragraph, and we simply put into this section which my friend objects to that which is necessarily implied and expressed in the bill itself.

Id. at 16271.

Representative Mann was not satisfied. In the only clear reference in the legislative proceedings to the problem presented in this case, he argued that addition of banks to the exclusionary clause was substantive because before the amendment the competing corporations provisions prohibited interlocks between banks and non-banks, and after the amendment it did not. *Id.* at 16272-73.

Before the proponents of the bill could respond the Speaker ruled against Representative Mann's point of order. There was therefore no concession by proponents that the amendment of the exclusionary clause went any further than to exclude from the competing corporations provision the bank interlocks that were the subject matter of the restored provision prohibiting bank interlocks — that is, interlocks between banks. The Speaker's ruling appears to have been based upon the premise that this was the amendment's effect. *Id.* at 16273.

In the course of the exchange Representative Sherley indicated that banks might not be within the competing corporations provision because they "are not such corporations as 'are or shall have been theretofore, by virtue of their business and location of operation, competitors' with industrial corporations." *Id.* at 16271. As noted earlier, however, failure to anticipate that banks might sometimes compete with non-banking corporations does not suggest an affirmative intention to exempt interlocking directorships from a generally phrased prohibition. *Cf. United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944).

circumstances the comment has little weight. [59]

V.

Appellees also rely on a number of congressional staff reports published after the enactment of the Clayton Act in support of the view that Section 8 does not reach interlocks between banks and non-banking corporations. These materials are unpersuasive for a variety of reasons. The congressional staff reports are merely assertions without analysis or support, are ambiguous, or refer to vertical interlocks or interlocks between b anks and not to interlocks between competing corporations. [60]

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[59] *See NLRB* v. *Fruit Packers*, 377 U.S. 58, 66, 84 S.Ct. 1063, 1068, 12 L.Ed.2d 129 (1964) ("But we have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach.")

[60] *Interlocks in Corporate Management*, Staff Report of the House Committee on the Judiciary (Antitrust Subcommittee), 89th Cong., 1st Sess. 25-26 (Comm. print 1965), described the competing corporations paragraph as relating to "industrial and commercial" corporations and containing "no prohibition . . . against . . . interlocks between the banking organizations and other types of corporations." But the report does not examine the statutory language, structure or legislative history, and later quotes a statement from the report of the special President's Committee on Financial Institutions (Heller Report) explicitly recognizing the ambiguity of the paragraph in this respect. *See id.* at 110.

Control of Commercial Banks and Interlocks Among Financial Institutions, Staff Report of the Subcomm. on Domestic Finance of the House Comm. on Banking and Currency, 90th Cong., 1st Sess. 39-40 (Subcomm. print 1967) states that the banking section "does not apply to interlocks between commercial banks and competing financial institutions, such as mutual savings banks, insurance companies, and small loan companies." But this statement addressed limitations of the banking provisions, not of the competing corporations provision, and contains no discussion of the competing corporations provision or of the exclusionary clause itself.

The language quoted by the district court (422 F.Supp. at 691) from *Commercial Banks and their Trust Activities: Emerging Influence on the American Economy*, Staff Report of the Subcomm. on Domestic Finance of the House Comm. on Banking and Currency, 90th Cong., 2d Sess. 11 (Subcomm. print 1968), concerns vertical interlocks and thus is not germane

Appellees argue that subsequent introduction of legislative proposals that would have barred bank/non-bank interlocks[61] indicates that Congress thought Section 8 did not do so, and that the failure of these proposals indicate Congress did not wish to prohibit such interlocks. No relevant inference can be drawn from these proposals. None expressly prohibited interlocks between competing banks and non-banking corporations. Even if they had, an amendment proposed to close an apparent loophole may be defeated because "the existing legislation already incorporated the offered change." *United States* v. *Wise*, 370 U.S. 405, 411, 82 S.Ct. 1354, 1358, 8 L.Ed.2d 590 (1962).[62] Moreover, all of the proposals were broadly stated. Since Congress' failure to enact them may have reflected disagreement with any of their comprehensive provisions, it is not evidence that Congress believed interlocks between banks and competing non-banking corporations should not be prohibited. Moreover, even if an inference as to the views of a subsequent Congress could be drawn from these proposals, only the views of the Congress that enacted the Clayton Act are relevant. "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United*

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to the problem of horizontal interlocks between competing corporations or the scope of the exclusionary clause.

However, a passage in the summary of recommendations at the beginning of the latter report does state that Section 8 does not apply to interlocks between banks and competing financial institutions, including insurance companies, that are not banks, and terms this perceived omission "a major loophole." *Id.* at 10. This is, however, a bare statement unsupported by any discussion or analysis of either the competing corporations provision or the exclusionary clause, and refers only to a similarly bare assertion in the text of the report. *Id.* at 925-26.

[61] Substantially identical amendment legislation failed to be enacted on several occasions. *See* H.R. 11572, 89th Cong., 1st Sess. (1965); H.R. 2509, 90th Cong., 1st Sess. (1967); H.R. 2346, 91st Cong., 1st Sess. (1969); H.R. 3245, 92d Cong., 1st Sess. (1971); H.R. 5700, 92d Cong., 1st Sess. (1971); H.R. 13581, 93d Cong., 2d Sess. (1974); H.R. 14997, 93d Cong., 2d Sess. (1974); H.R. 4406, 94th Cong., 1st Sess. (1975).

[62] *See also Order of Ry. Conductors* v. *Swan*, 329 U.S. 520, 529, 67 S.Ct. 405, 409, 91 L.Ed. 471 (1947).

States v. *Philadelphia National Bank*, 374 U.S. 321, 348-49, 83 S.Ct. 1715, 1733, 10 L.Ed.2d 915 (1963).[63]

The enactment and later repeal of Section 8A of the Clayton Act is also irrelevant. Section 8A was adopted in 1933 as part of a comprehensive scheme to restore public confidence in banking by curbing bank involvement in securities speculation,[64] and was repealed two years later. It barred interlocking relationships between banks and business entities making loans secured by stocks or bonds. It had nothing to do with fostering competition; it applied whether or not the interlocked entities competed. It applied only to interlocks between banks and companies making loans secured by securities, and had no bearing on other interlocks between banks and non-banking corporations. Conversely, the competing corporations provision of Section 8 did not prevent interlocks between banks and corporations making loans secured by stocks or bonds if they did not compete. In view of the dissimilarity in both purpose and effect, enactment and repeal of Section 8A throws no light on whether the Congress that adopted 8A in 1933 or the Congress that repealed it in 1935 thought the competing corporations paragraph of Section 8 was applicable to bank/non-bank interlocks.[65]

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[63] *See United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170, 88 S.Ct. 1994, 2001, 20 L.Ed.2d 1001 (1968).

[64] *See* H.R. Rep.No.150, 73d Cong., 1st Sess. (1933); S.Rep. No. 77, 73d Cong., 1st Sess. (1933).

[65] In related context the Federal Trade Commission disposed of the argument based on Section 8A as follows:

Nor do we ascribe any significance to the brief existence of Section 8A of the Clayton Act, which was added by the Banking Act of 1933, ch. 89, §§ 32, 33, 48 Stat. 194-95, and then repealed by the Banking Act of 1935, ch. 614, § 329, 48 Stat. 717-18. Section 8A prohibited director, officer or employee interlocks between banks and corporations (other than mutual savings banks) which made loans "secured by stock or bond collateral." Although Perpetual contends that the enactment and repeal of Section 8A lead to the conclusion that Congress recognized that the original Section 8 never reached bank/non-bank interlocks, that it enacted Section 8A to bridge that statutory gap, and that the repeal of Section 8a restored the prior situation, again legalizing such interlocks, these conclusions are unwarranted. The enactment and repeal of Section 8A took place against the

VI.

Nothing in the plethora of materials relied upon by appellees or by the government resolves the ambiguity as to whether the competing corporations provision covers interlocking directories between large competing banks and non-banking corporations. The factor that compels resolution of the ambiguity in favor of coverage is the purpose of Congress. We have seen that coverage is consistent with Congress' overall purpose to strengthen the Sherman Act by prohibiting interlocking directorates that threaten competition. Non-coverage is inconsistent with that purpose. [66] Nowhere in the legislative history is there any suggestion that exclusion of interlocking directorates between large competing banks and non-banking corporations would serve any countervailing Congressional policy.

The district court accepted appellees' policy argument that banning interlocks between banks and insurance companies "could clearly reduce the number of qualified directors, possibly to the detriment of the public at large." 422 F.Supp. at 702. The primary support for this proposition came not from the legislative history but from a 1971 statement by Arthur Burns, Chairman of the Federal Reserve Board, that because of the "experience and expertise" of bankers, their service on boards of directors of other corporations involved and the public they serve." [67]

Five years after the statement quoted by the district court, however, Mr. Burns explained that his statement that interlocking directo-

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backdrop of Congressional concern about the diversion of bank funds into speculative securities, reasons wholly removed from the competitive concerns embodied in the policy of Section 8. Since neither the passage nor the repeal of Section 8A expressed any Congressional intent to authorize the type of interlocks presented in this case, they do not affect our holding that such interlocks violate Section 5.

In re Perpetual Federal Savings & Loan Ass'n, supra, 90 F.T.C. at 656 n.15.

[66] *See* Parts II & III *supra*.

[67] 422 F.Supp. at 702.

rates involving bankers "are not necessarily harmful" did not apply to interlocking directorates between corporations competing for funds:

> [I]nterlocking relationships between institutions that compete for the funds of the public involve a risk of abuse that the Board believes outweighs the reasonable expectation of benefits that might flow from such relationships.[68]

Moreover, in testimony before the House Committee on Banking and Currency, Mr. Burns repeated his view that interlocks between competing financial institutions should be prohibited, and advocated an amendment to Section 8 to make it "entirely clear that [the competing corporations paragraph of Section 8] applies to interlocks between banks and non-bank businesses."[69]

In any event, Mr. Burns' view, however perceptive, is nonetheless irrelevant. At issue is the policy judgment of the Congress that enacted the Clayton Act. The legislative history leaves no doubt that the Congress viewed interlocking directorates between large competing corporations as contrary to the public interest because they potentially eliminate competition and lead to the concentration of capital,[70] and specifically rejected "[t]he idea that there are only a few men in any of our great corporations and industries who are capable of handling the affairs of the same" as "contrary to the spirit of our institutions."[71]

VII.

The inapplicability of the competing corporations provision to interlocks between competing banks and non-banking corporations is assertedly supported by "[m]ore than 60 years of administrative interpretation . . . of Section 8."[72]

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[68] Letter to Senator Proxmire, September 28, 1976, cited in *In re Perpetual Savings & Loan Ass'n, supra*, 90 F.T.C. at 622.

[69] Hearings on H.R. 5700 Before the House Comm. on Banking and Currency, 92nd Cong., 1st Sess. 278 (1971).

[70] *See* Part II *supra*.

[71] H.R.Rep. No. 627, 63d Cong., 2d Sess. 19 (1914).

[72] *United States* v. *Crocker Nat. Corp.*, 422 F.Supp. 686, 690 (N.D.Cal.1976).

The evidence of the views of the Federal Trade Commission relied upon by the district court is equivocal [73] and in any event of little force in light of the opinion filed by the Commission in *In re Perpetual Federal Savings & Loan Ass'n.*, 90 F.T.C. 608 (1977), vacated on

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[73] The district court (422 F.Supp. at 690-91) relied upon an introductory paragraph quoted from the Report of the Federal Trade Commission on Interlocking Directorates, H.R. Doc. No. 652, 81st Cong., 2d Sess. 10 (1950). If the paragraph is considered in the context of the more specific material it introduces, it is not clear whether the authors were stating that interlocks between banks and non-banking corporations are not barred or that vertical interlocks between banks and the corporations with which they do business are not barred.

The emphasis in the report on vertical bank/non-bank interlocks and the lack of discussion of horizontal interlocks suggests that the reference is only to vertical interlocks. For example, the report states that the "loophole" for vertical interlocks raises problems such as "preferential access to credit for the industrial corporation," and a concomitant substantial handicap to other concerns dependent upon that bank for service. *Id.* at 15; *see id.* at 25, 27, 36. Although the report documents vertical interlocks between commercial and financial companies in a number of industries, nowhere does it directly address interlocks between banks and their non-bank competitors.

The testimony of former FTC Chairman Engman reported in *Hearings on Corporate Disclosure Before the Subcommittee on Budgeting Management, and Expenditures and the Subcommittee on Intergovernmental Relations, Senate Committee on Government Operations*, 93d Cong., 2d Sess. pt. 2 (1974), also cited by the district court, clearly applies only to vertical interlocks. Mr. Engman addresses the subject of interlocks between "financial institutions, particularly commercial banks, [and] commercial corporations" but his testimony on this subject is limited to "vertical interlock[s] between borrower and lender" which might establish "perferential access to credit" and when multiplied, might lead to the "representation of competitors on the same bank boards . . . [which] may lead to exchanges of information between competitors, collusive activity, and possible communities of interest strong enough to provide a substantial handicap to nonrepresented companies dependent upon those banks for essential services." *Id.* at 901. This testimony has no bearing upon the direct bank/non-bank interlocks between competitors at issue here.

A speech by James Halverson, Director of the Bureau of Competition, cited by appellees, is irrelevant for the same reason. *See* Halverson, "Interlocking Directorates — a Government View," BNA A.T.R.R. No. 708 at E-1 through E-7 (April 8, 1975).

other grounds, 94 F.T.C. 491 (1979), after the decision below. The Commission held that interlocks between a savings and loan company and competing banks violate the policy of Section 8 of the Clayton Act and are therefore an unfair trade practice violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Technically it was unnecessary for the Commission to decide whether such interlocks also violated Section 8, but the Commission's review of the legislative history leaves no doubt of the Commission's view. The Commission rejected essentially all of the arguments advanced by appellees in this case. The Commission found it "unmistakable" "[t]hat Congress, in enacting Section 8, intended to outlaw interlocks between substantial competitors," 90 F.T.C. at 654, and found that "director interlocks between competitors are the evil at which Section 8 of the Clayton Act is directed," *id.* at 655. The Commission could identify no policy consideration that excludes bank/non-bank interlocks from Congress' "clear antipathy toward interlocking directorates," *id.* at 656, and concluded that is no "indication that Congress carefully considered interlocks between banks and *competing* non-banks, and made a conscious decision to immunize such arrangements while generally condemning other horizontal interlocks." *Id.* (emphasis in original).

The Department of Justice's interpretation is said to be reflected in a statement of a former Assistant Attorney General, and in the paucity of enforcement activity. The Assistant Attorney General's statement in fact recognizes the ambiguity of the statute,[74] and the failure of

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[74] Former Assistant Attorney General Kauper wrote that Section 8 "*may* not be directly applicable" to interlocks between competing financial institutions and insurance companies, *see* American Metal Market, Vol. 81, No. 137, July 16, 1974 (emphasis added).

A 1966 report by the President's Committee on Financial Institutions also acknowledged the ambiguity, stating that the

> exemption was presumably inserted in order to omit from coverage of the second part of section 8 those relationships among banks already covered by the first part. It might be interpreted, however, as exempting an interlocking directorate between a bank and a competng financial institution even though the latter type of interlocking rela-

enforcement officials to act is not a binding administrative determination of Congress' intent as to the statute's scope. [75]

* * * * * *

Because the purpose of strengthening the Sherman Act by eliminating interlocking directorates between large competing corporations is obviously best served by reading the ambiguous language of the exclusionary clause in the competing corporations paragraph of Section 8 as limited to interlocking directorates between banks; and because no purpose reflected in the legislative history of the Clayton Act would be served by excluding from the coverage of the statute interlocks between banks and non-banking corporations that are in such competition with each other that an agreement between them would violate the Sherman Act, we conclude that the statute should be interpreted to bar such interlocks.

VIII.

Appellees contend that even if the interlocks between the insurance companies and the banks in this csae violate Section 8's prohibition against interlocks between competing corporations, the interlocks between the insurance companies and the bank holding companies do not because the insurance companies and the bank holding companies are not "competitors" as required before the competing corporations provision of Section 8 is applicable.

The parties stipulated that each bank is the wholly-owned subsidiary of its parent company and that each parent company is a bank holding company registered under the Bank Holding Company Act, 12 U.S.C. § 1841 *et seq.* It is also stipulated that the bank holding companies are not in and of themselves or through any subsidiaries, other than their bank subsidiaries, competitors of any of the insurance

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tionship is not covered by the first part of section 8. The Committee believes that the Clayton Act needs clarification in this respect.

Report of the Committee on Financial Institutions to the President of the United States 53 (1963) (emphasis in original).

[75] *See United States* v. *Du Pont & Co.*, 353 U.S. 586, 590, 77 S.Ct. 872, 875, 1 L.Ed.2d 1057 (1957).

companies, but that each bank holding company controls its subsidiary bank by and through its ownership of stock and its election of all the subsidiary's directors who in turn manage the bank and select the officers that control the bank's operations and activities. [76]

A parent corporation is not a competitor of another corporation merely because its subsidiary is. [77] On the other hand, to interpret Section 8 as meaning that the business activity of the subsidiary can never be considered in determining whether the parent is a "competitor" within the meaning of Section 8 would assume that Congress intended to permit such a simple and obvious means of avoidance as to render the statute meaningless, and would ignore the Supreme Court's admonition that the antitrust laws are "aimed at substance rather than form." *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227, 67 S.Ct. 1560, 1565, 91 L.Ed. 2010 (1947).

Whether for the purposes of Section 8 the business of a subsidiary is to be attributed to a parent in determining if the parent competes with another corporation with which it is interlocked, turns upon the extent of the control exercised by the parent over the subsidiary's business. "[W]here the major policies of the subsidiaries are directed by the parents, it would seem that there is a strong case for holding the directorships unlawful." *United States* v. *Cleveland Trust Co.*, 392 F.Supp. 699, 712 (N.D.Ohio 1974), *aff'd*, 513 F.2d 633 (6th Cir. 1975), *quoting* Kramer, *Interlocking Directorships and the Clayton Act after 35 Years*, 59 Yale L.J. 1266, 1268 n.11 (1950). If the parent substantially controls the policies of its subsidiary, it may fairly be said, in the language of the competing corporations provision of Section 8, that the "business and location" of the parent include the business and location of the subsidiary.

The stipulations establish that in this case the parent bank holding companies control their bank subsidiaries in fact. The federal banking statutes establish such control as a matter of law. By definition, the

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[76] *See* 422 F.Supp. at 688.

[77] *See Kennecott Copper Corp.* v. *Curtiss-Wright Corp.*, 584 F.2d 1195, 1205 (2d Cir. 1978) (reserving issue of whether statute would cover "parent corporation that closely controls and dictates the policies of its subsidiary.").

business of a bank holding company is controlling subsidiary banks. The Bank Holding Company Act, 12 U.S.C. § 1841(a)(1), defines "bank holding company" as "any company which has control over any bank or over any company that is or becomes a bank holding company." Section 1841(a)(2) provides that a company controls a bank if the company has voting power over 25 percent of any class of the voting securities of the bank and controls the election of a majority of its directors. The statute establishes a conclusive presumption of control on the facts stipulated in this case. [78]

The banking provision of Section 8 prohibits only interlocks between one "bank, banking association, savings bank or trust company" and another, and does not refer to bank holding companies. Nonetheless, the Federal Reserve Board interpreted these provisions as prohibiting an interlock between a bank and a bank holding company if an interlock between the bank and any bank subsidiary of the bank holding company would be prohibited. The Board based this interpretation upon the fact that the affairs of bank holding companies and their bank subsidiaries are so closely identified and functionally related that the possibility of the abuse the banking provision of Section 8 was designed to guard against would be equally present whether the bank holding company or its bank subsidiary were involved. It would therefor frustrate the purpose of Congress to give cognizance to the separate corporate entities. The Board held that in order to effectuate the purpose of Congress, "[a] holding company whose principal activity is the ownership and control of banks, and each of its bank subsidiaries, should be considered as constituting together a single entity for the purposes [of the banking provisions] of Section 8." [79]

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[78] *See* 12 C.F.R. § 225.2(a) (1980). *See also* Comptroller's Manual for National Banking, Rule 7.7376(d) (applying to operating subsidiaries all federal banking laws applicable to their parents).

[79] *See* 12 C.F.R. § 212.102(d) (1976). The Board relied upon earlier Board determinations treating a bank holding company and its bank subsidiary as a single entity under Section 8 of the Clayton Act, *see* 12 C.F.R. § 212.101 (1976), and also under § 32 of the Banking Act of 1933, 12 U.S.C. § 78 (1976), *see* 12 C.F.R. § 218.114 (1976).

For the same reason, the competing corporations provision of Section 8 should be read to bar interlocks between a bank holding company whose principal activity is the ownership and control of banks and a nonbanking corporation with which the subsidiary bank of the bank holding company competes. Bank holding companies and their subsidiary banks are indistinguishable in terms of the purpose Congress sought to achieve.

The staff and agency reports relied upon by appellees are not to the contrary.[80] In addition to expressing concern about vertical interlocks, they question whether the statute covers "indirect interlocks" — as, for example, when a director of corporation X serves as a director of corporation A and another director of X serves on the board of A's competitor B, creating an indirect interlock between A and B. The interlocks at issue here are not "indirect" in that sense. The competing corporations provision prohibits a person from serving as "a director in any two or more corporations" at the same time; here one person serves simultaneously as a director of both a bank holding company and an insurance company, and the question is merely whether the two corporations are, within the meaning of the statute, competitors. The cases relied upon by appellees are also unpersuasive.[81]

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[80] *See* Staff of House Comm. on the Judiciary (Antitrust Subcomm.), 89th Cong., 1st Sess., *Report on Interlocks in Corporate Management* 26 (Comm. print 1965); *Report of the Federal Trade Commission on Interlocking Directorates*, H.Doc. No. 652, 81st Cong., 2d Sess. 14-15 (1951).

[81] Contrary to appellees' suggestion, *In re Penn Central Securities Litigation*, 367 F.Supp. 1158 (E.D.Pa.1973), does not hold that a parent and subsidiary can never be treated as a single entity under section 8 despite a high degree of control by the parent. The district court said it was not convinced interlocks between subsidiaries of the same parent could never violate Section 8, but found the Section 8 issue to be moot. *See id.* at 1168. The statement in *Paramount Pictures Corp.* v. *Baldwin-Montrose Chemical Co.*, 1966 Trade Cas. ¶ 71,678, p. 82,065 (S.D.N.Y.) that a "subsidiary or parent corporations of those corporations in which there is an allegedly infringing interlocking directorate are not to be considered in determining whether competition exists between the directed corporations," was made with respect to a situation where the activities of some affiliated companies were "completely unrelated" and any competition between the subsidiaries was *de minimus*. Moreover the section 8 claim was found to be moot.

IX.

The district court held that if Section 8 of the Clayton Act did prohibit interlocking directorates between competing banks and non-banks contrary to the district court's view, the interlocks involved in this case would not be excluded from Section 8 by Section 2(b) of the McCarran-Ferguson Act, 59 Stat. 34 (1945), as amended, 15 U.S.C. § 1012(b) (1976), which provides a limited exemption from the antitrust laws for the business of insurance.[82] Appellees filed a cross-appeal to preserve this issue. We agree with the district court.

The McCarran-Ferguson Act was adopted in response to the holding in *United States* v. *South-Eastern Underwriter's Association*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944), "that insurance transactions were subject to federal regulation under the Commerce Clause, and that the antitrust laws, in particular, were applicable to them." *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 458, 89 S.Ct. 564, 567, 21 L.Ed.2d 668 (1969). The purpose of the McCarran-Ferguson Act "was stated quite clearly in its first section; Congress declared that 'the continued regulation and taxation by the several States of the business of insurance is in the public interest.' 59 Stat. 33 (1945), 15 U.S.C. § 1011." *Id.*

Section 2(b) of the McCarran-Ferguson Act provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, [the Sherman Act, the Clayton Act, and the Federal Trade Commission Act] shall be applic-

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The statement in *United States* v. *Sears, Roebuck & Co.*, 165 F.Supp. 356, 358 (S.D.N.Y. 1958) that "[t]he provisions of the decree are not limited to the language of Section 8 . . . which by its terms is applicable to directors of corporations engaged in competition" is dictum not affecting the decision, and in any event does not imply, as appellees argue, that Section 8 is categorically inapplicable to situations where the competition between the interlocked companies arises solely from competition between one of those companies and the other's subsidiary.

[82] *See United States* v. *Crocker National Corp.*, *supra*, 422 F.Supp. at 706.

able to the business of insurance to the extent that such business is not regulated by State law."[83]

Section 2(b) provides a limited antitrust exemption for conduct that is (1) "the business of insurance," and (2) "regulated by state law." *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205, 219, 99 S.Ct. 1067, 1077, 59 L.Ed.2d 261 (1979).[84]

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[83] The Act provides in relevant part:

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> Sec. 2(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State Law . . . .
>
> Sec. 3(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.
>
> (b) Nothing contained in this [Act] shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

15 U.S.C. §§ 1011-1013 (1976).

[84] Section 3(b) of the Act also excludes from the exemption "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." *See* note 83, *supra*.

The most obvious reason for rejecting a claim of immunity in this case is the absence of any state law regulating the challenged activity that might be impaired by application of Section 8 of the Clayton Act.

The courts have had some difficulty developing standards for determining whether activity is "regulated by State law" for the purposes of Section 2(b).[85] Whatever the test, however, the New York and New Jersey statutes upon which appellees rely clearly do not regulate the interlocking directorate challenged in this case. Nor would application of Section 8 of the Clayton Act to these interlocks "invalidate, impair, or suspersede" these state statutes.

The New York Statute prohibits interlocking directorates between "two or more insurers . . . engaged in writing directly the same lines of commerce in insurance" unless such interlocks do not lessen competition or create a monopoly "in the business of insurance."[86]

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[85] See cases summarized in *Dexter* v. *Equitable Life Assurance Soc'y of the United States*, 527 F.2d 233, 236 n.9 (2d Cir. 1975); 1 National Association of Insurance Commissioners, *Monitoring Competition: A Means of Regulating the Property and Liability Insurance Business* 231-45 (1974); Weller, *The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy*, 1978 Duke L.J. 587, 606-14. One court, for example, found a McCarran-Ferguson exemption to be warranted upon a showing that the state had enacted a "comprehensive set of regulations" for the business of "title insurance." *Commander Leasing Co.* v. *Transamerica Title Ins. Co.*, 477 F.2d 77, 83 (10th Cir. 1973). *See also Ohio AFL-CIO* v. *Insurance Rating Bd.*, 451 F.2d 1178, 1182-83 (6th Cir. 1971). Other courts have focused on whether the state regulated the specific conduct alleged to be in violation of the federal antitrust laws. *See Lawyers Title Co. of Mo.* v. *St. Paul Title Ins. Corp.*, 526 F.2d 795, 797 (8th Cir. 1975); *Crawford* v. *American Title Ins. Co.*, 518 F.2d 217, 219 (5th Cir. 1975).

[86] The New York Insurance Law provides:

> No person shall serve as a director of two or more insurers under this chapter which are or during the next preceding two years have been engaged in writing directly the same lines of commerce in insurance unless such interlocking directorate is not used as a means to substantially lessen competition generally in the business of insurance or create a monopoly therein. Notwithstanding the foregoing limitations any person otherwise qualified may be a director of two or more insurers having a common ownership or management if such common ownership or management is not otherwise proscribed and such interlock-

would application of Section 8 of the Clayton Act to these interlocks "invalidate, impair, or suspersede" these state statutes.

These statutes are part of the insurance codes of the two states; both deal exclusively with the insurance industry. They purport to regulate interlocking directorates between insurance companies affecting competition in the insurance business. They do not apply to interlocks between insurance companies and banks affecting competition in the extension of mortgage and real estate loans. No action against such interlocks would lie under these state statutes; application of the Clayton Act to such interlocks would in no way impair them. For these reasons alone, the McCarran-Ferguson Act does not bar application of Section 8 of the Clayton Act to the bank and insurance company interlocks involved in this case. [88]

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ing directorate is not used as a means of substantially lessening competition generally in the business of insurance or of creating a monopoly therein.

N.Y.Ins.Law § 67(2) (McKinney) (Supp.1980).

[87] The New Jersey Insurance Code provides:

No person shall be a director of 2 or more competing insurers so as to substantially lessen competition generally in the business of insurance or annuity or to create a monopoly therein.

N.J.Stat.Ann. § 17B:30-11 (West) (Supp.1980).

[88] Appellees' reliance on *Addrisi* v. *Equitable Life Assurance Soc'y of the United States*, 503 F.2d 725 (9th Cir. 1974), is misplaced. In *Addrisi* this court concluded that State law preempted application of federal antitrust laws to an alleged tying arrangement because state law regulated the same behavior. *Id.* at 728. *See Greenberg* v. *Equitable Life Assurance Soc'y of the United States*, 34 Cal.App.3d 994, 110 Cal. Rptr. 470 (1973). In contrast, neither New York nor New Jersey statutes regulate interlocks between banks and insurance companies. They merely prohibit certain types of interlocks and remain silent as to the rest. There is no evidence that either state has made a policy choice affirmatively to allow interlocks not specifically prohibited under the statutes. Neither state has a general statute regulating corporate interlocks, although New York has a number of statutes which like N.Y.Ins.Law § 67(2), regulate interlocks in particular industries. *See* N.Y.Transp.Law § 119(3) (McKinney) (1975) (rail and water carriers); N.Y.Alco.Bev. Cont.Law §§ 105(16), 106(13) (McKinney) (1970) (liquor

This conclusion is supported by the general principle that coordinate federal and state authority should be accommodated when possible and the inferior law should be preempted only to the extent necessary to accomplish the purpose of the law that is supreme. [89]

It also is consistent with the purpose of the McCarran-Ferguson Act. The language and legislative history show clearly that Congress intended to create a partial antitrust immunity limited to the insurance

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retailers); N.Y.Banking Law § 130(3) (McKinney) (Supp.1980) (banks); *id.* 143(3) (bank holding companies); *id.* § 209(1) & (2) (foreign banks; national banks); *id.* § 247(5) (savings banks); *id.* § 399(5) (savings and loans); *id.* § 399-a (federal savings and loans).

[89] *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117, 126-27, 94 S.Ct. 383, 389, 38 L.Ed.2d 348 (1973); Weller, *To Preempt or to Accommodate: The Question of State and Federal Antitrust Laws Under the McCarran-Ferguson Act*, 9 Tol.L.Rev. 421, 426 (1978).

The legislative history of the McCarran-Ferguson Act indicates that Congress intended this principle to apply under the Act. Legislation to exempt the insurance industry completely from the antitrust laws passed the house, but died in the Senate. *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. at 218-19, 99 S.Ct. at 1076-77. The legislation that became the McCarran-Ferguson Act was introduced a year later. It rejected total exemption and instead required only that the antitrust laws not be construed to "invalidate, impair, or supersede" any state law enacted for the purpose of regulating the business of insurance. 91 Cong.Rec. 478 (1945); *cf.* 15 U.S.C. § 1012(b) (1976). To the extent that a state regulatory scheme would not be "impaired," the federal antitrust laws were to apply. Several Senators thought even this limited exemption too broad, questioning the advisability of permitting states to preempt the antitrust laws. *See, e.g.*, 91 Cong. Rec. 481 (1945) (remarks of Sen. Murdock); *id.* at 483 (remarks of Sen. O'Mahoney). The Senate adopted an amendment proposed by Senator Ferguson excluding the Sherman and Clayton Acts from this section of the Act. As amended, this section provided that "No Act of Congress, *except . . . the Sherman Act, and/or . . . the Clayton Act*, shall be construed to invalidate, impair, or supersede" state law. *Id.* at 488 (emphasis added). The House rejected the Ferguson Amendment, however, and passed the bill with the original language intact. *Id.* at 1085, 1093-94. The antitrust proviso was added in Conference as a compromise. As such, it was understood in the Senate, the only house to debate it, as an improvement on the House version of the Act. *See id.* at 1480-81, 1484 (remarks of Sen. Murdock); *id.* at 1478, 1485 (remarks of Sen. McCarran); *id.* at 1488 (remarks of Sen. Barkley). At a minimum, therefore, the federal antitrust laws apply to the extent they do

industry.[90] To extend immunity under the Act to conduct "involv-[ing] parties wholly outside the insurance industry," *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. at 231, 99 S.Ct. at 1083, would be contrary to this purpose and inconsistent with the canon requiring strict construction of antitrust exemptions. *Id.*

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not "invalidate, impair, or supersede" state law. *See* Weller, *supra* note 85, 1978 Duke L.J. 587, 602-07. Senator White stated that "the force and effect of these Federal statutes may be applicable and shall be applicable to whatever extent the State law fails to occupy the ground and engage in regulation[.]" 91 Cong.Rec. 1444 (1945). He asserted — and Senator McCarran, one of the Senate Conferees, agreed — that the antitrust laws would apply "throughout the whole field beyond the scope of the State's activity." *Id.*

[90] The statute refers only to the "business of insurance," thus excluding on its face those activities of insurance companies that are not part of such business. *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. at 211, 99 S.Ct. at 1073; *SEC* v. *National Securities, Inc.*, 393 U.S. at 453, 459-60, 89 S.Ct. at 564, 568, 21 L.Ed.2d 668. The Committee reports read solely in these terms. *See* H.R.Rep.No.213, 79th Cong., 1st Sess. (1945); H.R.Rep.No.143, 79th Cong., 1st Sess., *reprinted in* [1945] U.S.Code Cong. & Ad.News 670; S.Rep.No.20, 79th Cong., 1st Sess. (1945). There is no suggestion in the legislative debates that Congress intended to protect parties or activities outside this industry; some activities technically part of the "insurance industry" may not be exempt. *See Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. at 232 n.39, 99 S.Ct. at 1083 n.39. The bills drafted by the National Association of Insurance Commissioners and adopted in some states in response to the McCarran-Ferguson Act dealt only with intra-industry problems. *See* 1945 *Proceedings of the N.A.I.C.* 397-421. The "little Clayton Acts" adopted in many states, including New York and New Jersey, are similarly limited to intra-industry interlocks. *See, e.g.*, notes 86 & 87, *supra*. That Congress should limit the exemption to the insurance industry is not surprising:

> [T]here is a real danger that state insurance departments not only lack the authority and expertise to regulate other businesses, but that they are also apt to favor their industry at the expense of others. Trade restraints affecting other businesses, for example, might be viewed favorably if they add to the stability and financial security of insurance companies. Nor did Congress at any time intimate that the special needs of insurance transcended the insurance business and must include the ability to restrain trade in other sectors of the economy.

Weller, *supra* note 85, 1978 Duke L.J. 587, 632.

This is enough to dispose of appellees' McCarran-Ferguson claim. We note, however, though we do not decide, that McCarran-Ferguson immunity also may be unavailable for the independent reason that creation of interlocking directorates between banks and insurance companies may not be part of "the business of insurance" to which alone the statutory exemption applies. [91] The Supreme Court has emphasized that the McCarran-Ferguson exemption is invoked by state regulation of the "business of insurance" not the "business of insurance companies." *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. at 211, 99 S.Ct. at 1073; *SEC* v. *National Securities, Inc.*, 393 U.S. at 459-60, 89 S.Ct. at 568. "Many aspects of insurance companies are regulated by state law, but are not the 'business of insurance.' " *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. at 230 n.38, 99 S.Ct. at 1082 n.38. State statutes trigger antitrust immunity only to the extent they concern "the

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[91] There is language in *Group Life* from which one might infer that a state statute regulating the composition of boards of directors of insurance companies would not relate to the "business of insurance." 440 U.S. at 230 n.38, 99 S.Ct. at 1082 n.38.

Appellees point to statements in the Senate debate regarding Section 3(a), the moratorium provision (*supra* note 83), to the effect that the interlocking directorate provision of the Clayton Act would be stayed during the moratorium period to make it possible "to change the interlocking directorate laws of the states." 91 Cong.Rec. 484 (1945) (remarks of Sen. Ferguson); *id.* at 483; (remarks of Sen. O'Mahoney). It does not follow from these comments that Congress intended to include interlocking directorates in the "business of insurance" which states by regulating could exempt from the antitrust acts. The moratorium had several purposes, only one of which was to give states time to regulate activities which otherwise would be regulated by the federal antitrust laws. The moratorium was also intended to afford the states time in which to change those laws that might conflict with federal law in the areas where federal law would still be paramount, and to afford insurance companies time to adjust their activities to conform with federal regulation. *See id.* at 481, 486 (remarks of Sen. Murdock); *id.* at 483, 488 (remarks of Sen. O'Mahoney); *id.* at 1086 (remarks of Rep. Walter). Indeed it was concern for the latter two problems that provided the sole basis for including a moratorium provision in the Senate's version of the Act, which provided that the Clayton Act would apply to the business of insurance at the end of the moratorium period notwithstanding any inconsistent state regulation. *See* note 89, *supra*.

contract between the insurer and the insured," *id.* at 215, 99 S.Ct. at 1075, or involve "spreading and underwriting of a policyholder's risk." *Id.* at 211, 99 S.Ct. at 1073, *see id.* at 220-22, 99 S.Ct. at 1077-78. Appellees argue that selection of directors affects the status of insurance companies "as reliable insurers" which ultimately affects the relationship between the insurer and the insured, and is thus the "business of insurance." *See SEC* v. *National Securities, Inc.*, 393 U.S. at 460, 89 S.Ct. at 568. A similar contention was rejected in *Group Life*, 440 U.S. at 216-17, 99 S.Ct. at 1075-76. But even if the argument were persuasive as applied to interlocking directorates between insurance companies, it would not follow that interlocks between banks and insurance companies, affecting competition in the credit market rather than the market for insurance and the relationship between insurance companies and borrowers rather than their policyholders, would qualify as the "business of insurance" within the meaning of the statute. [92]

REVERSED.

KENNEDY, Circuit Judge, dissenting:

I respectfully dissent from that portion of the opinion which holds that section 8 of the Clayton Act does not exempt interlocking directorates between banks and non-banks which are competing entities. The principal reasons for my dissent are well-stated by Chief Judge Peckham in his thorough and persuasive opinion below, 422 F.Supp. 686 (N.D.Cal.1976), and I have little to add to that careful

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[92] *Cf. SEC* v. *National Securities, Inc.*, *supra*, 393 U.S. at 460, 89 S.Ct. at 568 (regulation of the relationship between a company and its shareholders is securities regulation, not insurance regulation).

Appellees argue that if any aspect of a unitary activity regulated by the state — in this case, the selection of a corporate board of directors — is the business of insurance, the entire activity is the business of insurance and thus exempt. This view was rejected in *National Securities*, where the Supreme Court held that state regulation of aspects of insurance company mergers that effect policyholders is regulation of the business of insurance, though concurrent state regulation of aspects of mergers affecting stockholders is not. *Id.*

explanation of the statute, an explanation which in my view is entirely correct.

Chief Judge Browning's meticulous examination of both the statute and its history demonstrates that the question is a difficult one. My principal objection to the rhetoric of the majority opinion is that the reasonable and plausible arguments of the district court are for the most part labeled bare assertions, while, viewed against the legislative history of this statute, the same epithet could be applied to most of what the majority opinion contends. No doubt, the purpose of the statute is of principal importance in ascertaining the scope of ambiguous terms, but the broad and simple formulation of a purpose to promote competition is insufficient to resolve a case which turns upon words and concepts that are much more precise. The purpose of the statutory exemption obviously was to narrow the range of its coverage. In my view, had Congress intended the exemption to cover only pure bank interlocks, it would have used much different language to do so.

If, measured by the legislative purpose to promote competition, my interpretation on the exemption can be characterized as a loophole, so be it. The lapse has been well-known to the business community, and there has been widespread reliance on the assumption that the statute does not cover these interlocks. Congress has not changed the statute, although it has considered the problem expressly. Legislative lacunae do not demand judicial correction, even if that correction invokes the broad doctrinal scheme that prompted the legislature to act initially. The judiciary is not a repair shop to streamline statutory structures, especially when what is perceived as an imperfection in the design is in fact the result of compromises which are the very essence of the legislative process. Errors absolutely unforeseen or wholly contrary to the legislative purpose might give the judiciary somewhat freer reign, *but cf TVA* v. *Hill*, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978), but a question over which there has been as much speculation and warning as this one neither requires nor permits judicial intervention to patch it up. The majority's strained efforts in its comprehensive opinion serve only to highlight and underscore the existence of a legislative intent to compromise and to narrow the statutory coverage, the vary opposite

of the premise ascribed to the Congress, a premise which is the sole basis for the majority's opinion.

With these few observations, I file this dissent to parts 1 through 8 of the majority's opinion. I concur in the reasoning and conclusions of the court in its interpretation of the McCarran-Ferguson Act.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-75-2108 RFP

UNITED STATES OF AMERICA,

Plaintiff,

v.

CROCKER NATIONAL CORP.; CROCKER NATIONAL BANK; METROPOLITAN LIFE INSURANCE COMPANY; THE EQUITABLE LIFE INSURANCE SOCIETY OF THE UNITED STATES; THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK; OTTO N. MILLER; EMMETT G. SOLOMAN; AND THOMAS R. WILCOX,

Defendants.

No. C-75-2109 RFP

UNITED STATES OF AMERICA,

Plaintiff,

v.

BANKAMERICA CORPORATION; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; BANKERS TRUST NEW YORK CORPORATION; BANKERS TRUST COMPANY; THE PRUDENTIAL INSURANCE COMPANY OF AMERICA; E. HORNSBY WASSON; AND PAUL A. GORMAN,

Defendants.

OPINION

GENERAL BACKGROUND

These cases concern the legality of certain interlocking directorates under section 8 of the Clayton Act, 15 U.S.C. § 19. The government's attack is aimed at two particular types of director interlocks which may be identified as follows: (1) *the bank interlocks*, occurring whenever an individual serves simultaneously as the director of a bank and an insurance company; and (2) *the bank holding interlocks*,

occurring whenever an individual serves simultaneously as a director of a bank holding company and an insurance company.

Specifically, in the context of these cases, the "bank interlocks" that the government challenges in the *Crocker* case (C-75-2108 RFP) arise from the fact that certain individual defendants, Otto N. Miller ("Miller"), Emmett G. Solomon ("Solomon") and Thomas R. Wilcox ("Wilcox") serve simultaneously as directors of defendant Crocker National Bank ("Crocker Bank") and as directors of one of the following insurance company defendants: the Metropolitan Life Insurance Company ("Metropolitan"), The Equitable Life Assurance Society of the United States ("Equitable"), and the Mutual Life Insurance Company of New York ("MONY"). The "bank holding interlocks" challenged in this case arise from the fact that those individual defendants also serve simultaneously as directors for Crocker Bank's parent corporation, Crocker National Corporation ("Crocker") and as directors for one of the aforesaid mentioned insurance companies.

In the *BankAmerica* case (C-75-2109 RFP), the "bank interlocks" that are challenged arise from the fact that certain individual defendants, E. Hornsby Wasson ("Wasson") and Paul A. Gorman ("Gorman") serve simultaneously as directors of either Bank of America National Trust & Savings Association ("Bank of America") or Bankers Trust Company ("Bankers Trust") and the Prudential Insurance Company of America ("Prudential"). The "bank holding interlocks" challenged there arise from the fact that the same individual defendants also serve simultaneously as directors for one of the aforesaid mentioned banks' parent corporations, BankAmerica Corporation ("BankAmerica") and the Bankers Trust New York Corporation ("Bankers"), and Prudential.

The parties' cross-motions for summary judgment are presently before the court. [1] They raise four questions, which, with one excep-

[1] Individual defendants Miller and Wasson, who have previously entered into settlement agreements with the Government, are the only parties not to bring summary judgment motions. It should also be noted that the Government's motion in the *BankAmerica* case is more properly denominated a motion for partial summary judgment due to the pending motion of BankAmerica and Bank of America that the case is moot with respect to them.

tion, revolve around the interpretation and application of the following portion of section 8 of the Clayton Act:

> No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, *other than banks, banking associations, trust companies,* and common carriers subject to the Act to regulate commerce . . . if such corporations are or shall have been theretofore, by virtue of their business and location of operation, *competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.* [15 U.S.C. § 19 (emphasis added).]

The four questions presented are as follows:

(1) Whether, in light of the "other than banks" language underscored above, the challenged "bank interlocks" are proscribed by section 8?

(2) Whether the "bank holding interlocks" are outside the scope of section 8 because the bank holding companies are not "competitors" of the insurance company defendants?

(3) Whether the above-quoted provision of section 8 applies to the corporate defendants or only to the individual director defendants?

(4) Whether, since both types of interlocks challenged by the government involve insurance companies, they are immunized from section 8 of the Clayton Act by virtue of the antitrust exemption provided in the McCarran Ferguson Act, 15 U.S.C. §§ 1011-1015?

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

In order to facilitate the court's ruling on the questions posed by these summary judgment motions, the parties have agreed to a series of stipulations including an agreed statement of facts. Basically, these stipulations concede the existence of each of the challenged interlocks,[2] establish that each of the corporate defendants are en-

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[2] See Crocker Stip. ¶¶ 15-19; BA Stip. ¶¶ 17-20.

gaged in interstate commerce and have capital surplus or aggregated undivided profits in excess of $1,000,000,[3] and admit that the bank defendants and insurance company defendants are competitors in certain mortgage and real estate loans such that an agreement between them to eliminate competition would be an antitrust violation.[4] The stipulations also establish that each bank defendant is the wholly-owned subsidiary of its parent company and that each parent company is a bank holding company registered under the Bank Holding Company Act, as amended 12 U.S.C. § 1841 *et seq.*[5] It is further established that the bank holding company defendants are not in and of themselves or through subsidiaries, other than the bank defendants, competitors of any of the insurance company defendants; however, each bank holding defendant admits that it controls its subsidiary bank by and through its ownership of stock and its election of all the subsidiary's directors who in turn manage the bank and select the officers that control the bank's operations and activities.[6]

DISCUSSION

I. Are Director Interlocks Between A Bank And An Insurance Company Prohibited By Section 8 Of The Clayton Act?

A. Introduction

In attacking the "bank interlocks" that exist among the defendants, the Government relies solely upon the fourth paragraph of section 8 of the Clayton Act, set forth in relevant part below:

> No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies and common carriers subject to the Act to regulate commerce . . . if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by

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[3] Crocker Stip. ¶¶ 6,7,8,11,12,13,14; BA Stip. ¶¶ 6,7,8,11,12,15,16.

[4] Crocker Stip. ¶ 3(c)(1) 21-29; BA Stip. ¶¶ 3(c)(1) 22-29.

[5] Crocker Stip. ¶¶ 8,11; BA Stip. ¶¶ 8,11,12,15.

[6] Crocker Stip. ¶¶ 3(c), 3(d), 9; BA Stip. ¶¶ 3(c), 3(d) 9,13.

agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

An examination of this language reveals four criteria which must be met before this statute may be applied: First, a person must simultaneously serve as a director of two or more competing corporations; second, at least one of the corporations must have capital, surplus, and undivided profits of an amount greater than $1,000,000; third, both or all of the corporations must be engaged in interstate commerce; fourth, the corporations must be other than banks, banking associations, trust companies and common carriers.

Upon the record before us, it is clear that the first three of these criteria are satisfied. *See* notes 2-4, *supra*, and accompanying text. The only question presented here is whether the fourth criteria — that the corporations be other than banks, banking associations, trust companies, and common carriers — has been met.

Defendants argue that none of the challenged bank interlocks involve two or more corporations *other than banks*. Rather, they note that each of the challenged bank interlocks involve two corporations, one of which *is* a bank. Accordingly, defendants argue that the clear statutory criteria of section 8 has not been satisfied, and, therefore, that the challenged bank interlocks are immune from prosecution under section 8. *See* Memorandum of Law in Support of Joint Motion for Summary Judgment of Defendants, p. 8 (hereafter "Defendants' Opening Brief").

The Government takes the position that the language "no person shall be a director in any two or more corporations other than banks" requires that *both* corporations, not just one, be banks in order to be exempt from section 8. Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment (hereafter "Gov't Opening Brief") p. 14. It contends that interlocking directorates between banks were specifically regulated in the first three paragraphs of section 8 and that the "other than banks" language of the fourth paragraph of section 8 could only have been intended to mean other than two banks which were regulated elsewhere in the statute. *See* Transcript of Oral Argument, June 25, 1976 (hereafter "Transcript"), p. 13. Any other interpretation, argues the Government, would leave a gaping loop-

hole in the regulation of interlocking directorates which Congress did not and could not have intended. In this regard, the Government relies heavily on the teaching of *United States* v. *Philadelphia Nat'l Bank*, 347 U.S. 321 (1963) that exemptions to the antitrust laws are not to be lightly implied. *Id.* at 343.

Notwithstanding the Government's vigorous argument on this question, we do not find their position to be convincing. As is set forth below in greater detail, it is the opinion of this court that a normal reading of the statutory language "two . . . corporations . . . other than banks" compels the conclusion that the statute applies only to two corporations, neither of which is a bank. Moreover, this conclusion is further buttressed by 60 years of administrative and Congressional interpretations to this effect, as well as by the statute's legislative history. Finally, it is readily apparent that the interpretation advanced by the Government is not consistent with the statutory structure by which Congress chose to specifically regulate interlocking directorates among banks and among common carriers, and is unsupported by section 8's legislative history.

B. The statutory language

It is the opinion of this court that an ordinary reading of the statutory prohibition "[n]o person . . . shall serve as a director in any two or more corporations . . . other than banks" means that banks were not to be subject to this prohibition. This interpretation is compelled by the Government's own analysis. Gov't Opening Brief, pp. 16-17. As the Government clearly sets forth in its brief, the fourth paragraph of section 8 features four clauses, each of which modifies the phrase "any two or more corporations":

> No person at the same time shall be a director in *any two or more corporations*
>
> (1)
>
> any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000,
>
> (2)
>
> engaged in whole or in part in commerce,

(3)

other than banks, banking associations, trust companies, and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven,

(4)

if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. [15 U.S.C. § 19 (emphasis added).]

With reference to this analysis, all parties agree,[7] and it is readily apparent to the court, that all of the four limiting clauses apply to both corporations involved in an interlock, except for the first clause which by its own specific terms may be satisfied by "any one of" the two interlocked corporations. Hence, it is clear then that both interlocked corporations must satisfy clause 2 — that is, they must both be engaged in whole or in part in commerce; that both corporations must satisfy clause 4 — that is, they must be competitors; and finally and most significantly, that both corporations must satisfy clause 3 — that is, they must both be other than banks, banking associations, trust companies and common carriers. *See also* 16B Von Kalinowski, *Antitrust Laws and Trade Regulation*, § 20.03 at p. 20-29 (1975) (hereafter "Von Kalinowski").

In light of this clear statutory language, further inquiry here would not appear necessary. *See Ernst and Ernst* v. *Hochfelder*, ____ U.S. ____, 47 L.Ed.2d 668, 681 (1976). Nevertheless, in order to eradicate any lingering doubt that might persist about the validity of the Government's contentions, we will explore the other lines of argument advanced by the parties. We turn first to the continuous contem-

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[7] In originally offering this analysis, the Government mistakenly assumed that the defendants contended that the "other than bank" language was somehow related to, or intended to modify, the "any one of which" phrase which appears in clause 1. *See* Gov't Opening Brief, pp. 16-17. As defendants make clear in their own brief, this was never their position. Reply Memorandum of All Defendants Except E. Hornsby Wasson on Their Joint Motion for Summary Judgment (hereafter "Defendants' Reply Brief") p. 5.

poraneous construction which has been given to this statute for more than 60 years.

C. Administrative and Congressional interpretations of section 8.

More than 60 years of administrative interpretation and Congressional action confirm this court's interpretation of section 8.

In its 1950 Report on Interlocking Directorates, the Federal Trade Commission, which has concurrent jurisdiction with the Department of Justice in the enforcement of section 8, described the scope of that section as follows:

> The Clayton Act's two sections dealing with interlocking directorates embody three different rules of law applicable to different classes of corporations. One rule [,set forth in the fourth paragraph of section 8] governs corporations engaged in commerce *which are neither* banks, banking associations, trust companies nor common carriers. . . .
>
> [This] first rule [is] applicable generally to industrial and commercial corporations . . . . . [T]he type of relationship that is prohibited is narrowly defined. *The rule does not apply to interlocking directorates between . . . industrial and commercial corporations and financial institutions.* [Report of the Federal Trade Commission on Interlocking Directors, H.R. Doc. No. 652, 81st Cong., 2d Sess. 10 (1950) (emphasis added).]

See also Testimony of Lewis Engman, *Hearings on Corporate Disclosure Before the Subcommittee on Budgeting Management, and Expenditures and the Subcommittee on Inter-Governmental Relations, Senate Committee on Government Operations,* 93d Cong., 2d Sess., pt. 2 at 900-901 (1974).

The history of administrative interpretation of section 8 within the Antitrust Division has been to the same effect. Thus, notwithstanding the fact that approximately 40% of the insurance company directors in America are also bank directors,[8] these instant cases represent the first time, since section 8 was enacted over 60 years ago, that the Justice Department has attacked a bank/nonbank interlock of the type

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[8] Transcript p. 27.

now being challenged. In fact, shortly before the Justice Department filed these cases, Assistant Attorney General for Antitrust, Thomas Kauper, expressed concern about the interlocks that existed between financial institutions and insurance companies, but acknowledged that section 8 of the Clayton Act "may not be directly applicable." *See American Metal Market*, Vol. 81, No. 137, July 16, 1974.

Similarly, several Congressional bodies with antitrust and banking authority have studied section 8 and have concluded that it has no application to bank/nonbank interlocks. A Staff Report to the Antitrust Subcommittee of the Committee on the Judiciary of the House of Representatives, entitled "Interlocks in Corporate Management"[9] observed that there is:

> no prohibition in the statute against . . . either vertical or horizontal, direct or indirect, interlocks between the banking organizations and other types of corporations. (Id. at 25).

Likewise a Staff Report of the House Committee on Banking and Currency, noted as follows:

> One of the major provisions supported by Wilson and others for inclusion in the Clayton Act was the prohibition of interlocking directorates between major banking institutions on the one hand, and major industrial, commercial and transportation corporations on the other. Despite this support and the demonstrated need for such provisions shown in [Congressional investigative reports], these prohibitions against vertical corporate interlocks were never adopted. *Therefore, the banks remained and still remain free to have representatives on the boards of any nonbanking corporation.* [Staff of the Subcomm. on Domestic Finance of the House Comm. on Banking and Currency, 90th Cong., 2d Sess., *Report on Commercial Banks and their Trust Activities: Emerging Influence on the American Economy* at 11. (Subcomm. Print 1968.) (Emphasis added.) *See also id.* at 926.]

Indeed there have been several Congressional attempts to enact new legislation that would reach the "bank interlocks" challenged here. The first attempt at enacting this type of legislation occurred in 1933 and was in fact successful. It provided that the Clayton Act be amended by the addition of a new section 8A, which prohibited

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[9] 89th Cong., 1st Sess. (Comm. Print 1965).

interlocks between banks and other corporations that made "loans secured by state or bond collateral to any individual, association, partnership, or corporation, other than its own subsidiaries." Act of June 16, 1933, P.L. No. 66, ch 89, § 33, 48 Stat. 194. This section, however, was repealed on August 23, 1935 [10] with the specific intention of eliminating the prohibition against interlocking directorates among banks and institutions with which they competed in making loans. *See* H.R. Rep. No. 742, 74th Cong., 1st Sess. 24 (1935).

Moreover, there have been several more recent, though unsuccessful, attempts to amend section 8. H.R. 11572, introduced by Representative Celler on October 13, 1965, would have prohibited director, officer, or management-employee interlocks, as well as interlocks effectuated through potential nominees of these persons, between *inter alia* (a) actual or potential competitors or (b) actual or potential customers, suppliers, or sources of credit or capital. The bill was referred to the Committee on the Judiciary, where it died in Committee without hearings. Representative Celler thereafter introduced the same bill (H.R. 2509) on January 17, 1967, in the first session of the 90th Congress. That bill was also referred to the Judiciary Committee where it died without hearings. *See also* H.R. 2346, 91st Cong., 1st Sess. (Celler) (1969); H.R. 3245 92nd Cong., 1st Sess. (Celler) (1971); H.R. 13581 93d Cong., 2d Sess.(1974); H.R. 14997, 93d Cong., 2d Sess. (1974); H.R. 4406 94th Cong., 1st Sess. (1975). All these would have made the same change; and all died in committee. Similarly, in 1971, the House Committee on Banking and Currency held hearings on H.R. 5700. Sections 2, 3 and 4 of that bill would have prohibited *inter alia* interlocks between insurance companies and any bank insured by the F.D.I.C., any insured institution as defined in the National Housing Act, and noninsured mutual savings banks. Congress also allowed H.R. 5700 to die in committee.

Thus, these administrative and Congressional interpretations of section 8 further support this court's construction of that section's fourth paragraph. The Government, though, argues that these interpretations are of no help in interpreting section 8 and relies on *United*

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[10] P.L. No. 305, ch 614, § 329, 49 Stat. 717.

States v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 348-49 (1963) where the existence of administrative interpretations and Congressional action, similar to those described here, did not foreclose the court from reaching a result contrary to the thrust of those interpretations. In our opinion, however, *Philadelphia Bank* does not hold, as the Government contends, that such administrative and Congressional interpretations are totally irrelevant or devoid of all reliability. Rather, the case simply notes that the views of a subsequent Congress may often provide a hazardous basis from which to infer the intent of an earlier one. *Id.* We are aware of the pitfalls which that type of analysis entails. Nevertheless, in view of the clear and consistent manner in which Congress, the FTC, and the Department of Justice have *all* interpreted section 8 of the Clayton Act, we feel that such interpretations deserve mention. Certainly, at the very least, they are relevant to refute the Government's contention that section 8 "*unambiguously*" applies to "any two (or more) competing corporations engaged in commerce unless *both* such corporations are banks, banking associations, trust companies or common carriers." Gov't Opening Brief, p. 14.

However, even ignoring the administrative and Congressional interpretations just described, it is readily apparent that the Government's interpretation of section 8 cannot be sustained when examined in the light of the statutory structure and the legislative history of the Clayton Act.

D. The statutory structure of the Clayton Act

Both section 8 and 10 of the Clayton Act 15 U.S.C. §§ 19, 20, are concerned with the subject of interlocking directorates. The fourth paragraph of section 8, at issue here, governs interlocks between competing corporations in commerce *other than banks and common carriers*. Interlocking directorates for these excepted classes of corporations are governed in the first three paragraphs of section 8 and in section 10, respectively. [11]

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[11] The full text of both these sections is set forth in the Appendix to this opinion.

The first paragraph of section 8 prohibits a variety of horizontal interlocking relationships between certain Federal Reserve Member banks and other banks, banking associations, savings banks and trust companies. However, not all horizontal bank interlocks are prohibited. The first paragraph of section 8 contains seven specific exceptions to which the statute's prohibition is inapplicable. 15 U.S.C. § 19(1)-(7). The second and third paragraphs of section 8 also relate to interlocks between banks. The second paragraph of section 8 concerns certain transitional provisions that are no longer relevant. The third paragraph of section 8 authorizes the Board of Governors of the Federal Reserve System to enforce compliance with the provisions governing bank interlocks and to prescribe such rules and regulations as it deems necessary for that purpose.

Section 10 of the Clayton Act governs interlocking directorates among common carriers engaged in commerce. In contrast to the specific prohibitions set forth in section 8, section 10 provides only a limited type of regulation that is applicable to interlocks between a common carrier and a second company [12] that has certain supplier or buyer relationships with that common carrier. Significantly, section 10 does not prohibit or regulate horizontal interlocks among competing common carriers. Indeed, these interlocks were not regulated at all until 1920 when Congress amended the Interstate Commerce Act and authorized the Interstate Commerce Commission to assume this task. *See* 49 U.S.C. § 20a(12).

Given this statutory structure, the Government takes the position that the fourth paragraph of section 8 should be interpreted as follows:

> No person . . . shall be a director in any two or more corporations . . other than [two] banks; [that is other than banks as previously regulated in the Act].

Transcript, p. 13. [13] In other words, the Government argues that the "other than banks" language of paragraph 8 means "[w]here Congress

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[12] This second company may, but does not have to be, a common carrier.

[13] The use of brackets here serves to indicate how the Government's interpretation of this provision adds words to those used in the statute.

has previously regulated two bank interlocks they are not to be also proscribed under the fourth paragraph." *Id.*

In analyzing this argument, it is necessary to clarify what the Government means by the phrase "previously regulated." Initially, it appeared that the Government was using this phrase as meaning "previously prohibited." *See e.g.*, Gov't Opening Brief, p. 4. However, the use of the phrase in this manner poses serious problems. An analysis of the first three paragraphs of section 8 and of section 10 reveals that Congress did not prohibit all bank/bank interlocks in section 8 and did not prohibit horizontal carrier/carrier interlocks in section 10. Thus, were the Government to rely on a "prohibited elsewhere" interpretation, it would mean that certain bank/bank or carrier/carrier interlocks would be subject to the proscription of the fourth paragraph of section 8 despite the Government's assertion that that part of section 8 unambiguously "applies to any two (or more) competing corporations engaged in commerce unless *both* such corporations are banks, banking associations, trust companies, or common carriers." Gov't Opening Brief, p. 14.

Hence, it would appear that the Government's "previously regulated" theory encompasses a broader range of interlocks than those interlocks actually prohibited elsewhere in the statute. Rather, if the general subject was regulated elsewhere, as bank/bank interlocks were regulated in the first three paragraphs of section 8, the Government's position seems to be that the later language of exclusion found in paragraph 4 — the "other than banks" language — intended only to exclude those specific interlocks, and not bank/nonbank interlocks which the first three paragraphs of section 8 did not purport to regulate. The problem, however, with this theory is that when it is applied to the "other than . . . common carrier" language, which also appears in the fourth paragraph of section 8, an inconsistent result is reached.

As was previously indicated, Congress chose to regulate many carrier/noncarrier interlocks in section 10. Thus, applying the Government's "previously regulated" interpretation, it would follow that carrier/noncarrier interlocks would not be subject to paragraph 4's

prohibition. Yet, such a conclusion would also conflict with the Government's theory that paragraph four of section 8 was intended to apply to any two or more competing corporations engaged in commerce unless *both* such corporations were banks and common carriers, as well as with that theory's corollary that bank and nonbank interlocks, and hence, presumably carrier and noncarrier interlocks, would be subject to that section's prohibition. Hence, in order for the Government's "previously regulated" theory to produce the result that it desires, the plain language of section 8, prohibiting persons from serving as directors in any "two or more [competing] corporations . . . other than banks . . . and common carriers," would have to be interpreted as providing:

> No person . . . shall be a director in any two or more [competing] corporations . . . except that if *two* or more of the corporations are banks, . . . or if *one* or more of the corporations is a common carrier, the prohibition of this section will not be applicable as those interlocks are regulated elsewhere in the statute.

Such an interpretation would certainly strain the language that Congress chose to place in section 8. [14]

We note, however, that the Government's "previously regulated" theory is not completely off base. It is only the Government's view of what it means to say that a subject has been "previously regulated" which appears to be wrong. The legislative history underlying section 8 of the Clayton Act in fact suggests that Congress, having regulated banks in the first three paragraphs of section 8 and having regulated common carriers in section 10, wished to make clear that these classes of corporations were not to be regulated at all in paragraph 4 of section

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[14] Alternatively, if we focus upon the fact that the fourth paragraph of section 8 was concerned with interlocks among *competing* corporations, we again note that Congress did not choose to regulate any competing carrier/carrier interlocks in section 10. Hence according to the Government's "previously regulated" theory, Congress would have desired to regulate these interlocks pursuant to paragraph 4, section 8. However, even according to the Government's contention that the "other than banks . . . and common carriers" language of exclusion should be read as "other than [two] banks . . . and common carriers," this result would still be precluded.

8. Indeed this is the only interpretation that provides a consistent explanation of the "other than banks and common carrier" language that Congress utilized in section 8. In addition, as the following description of section 8's legislative history reveals, there is nothing to suggest bank/nonbank interlocks were to be subject to the prohibition of the fourth paragraph of section 8.

E. The legislative history of section 8

The Clayton Act's provisions regulating interlocking directorates grew out of the reports of two Congressional investigations of interlocking directorates. *See* U.S. House of Representatives Committee on Banking and Currency, *Investigation of Concentration of Control of Money and Credit*, H.R. Rep No. 1593, 62nd Cong., 3d Sess. (1913) (popularly and hereafter known as "Report of the Pujo Committee"); *Investigation of United States Steel Corp.*, H.R. Rep. No. 1127 62nd Cong., 2d Sess. (1912) (popularly and hereafter known as the "Report of the Stanley Committee"). These Congressional investigations in turn prompted Louis Brandeis to write a series of weekly magazine articles in which he vigorously attacked and revealed the extent of common corporate management among large business organizations, including banks and insurance companies. *See* Brandeis, "*Breaking the Money Trusts*," Harpers Weekly, Nov. 22, 1913 to January 17, 1914. *See particularly*, "*The Endless Chain — Interlocking Directorates*," Harpers Weekly for December 6, 1913. Finally, President Wilson himself demanded legislation to prohibit interlocking directorates among the "great corporations — banks and railroads, industrial, commercial and public service bodies." *See* H.R. Rep. No. 627, 63d Cong., 2d Sess. 17-18 (1914). As a result of all these efforts, the initial Clayton bill was introduced in the House and hearings were held; however, despite these beginnings, Congress never prohibited the "bank interlocks" that the Government attacks here.

1. *The initial Clayton Bill and trust hearings*. The initial Clayton Bill contained three sections which prohibited horizontal interlocking directorates with regard to three distinct classes of business organizations — railroads and certain other public service cor-

porations, banks, and other competing corporations.[15] At the hearings held on this bill, Mr. Brandeis testified that "both banks and insurance companies . . . ought to be included in that prohibition" of the bill relating to banks. *Hearings on Trust Legislation Before the House Comm. on the Judiciary*, 63d Cong., 2d Sess., 681 (1914) (hereafter "Trust Hearings"). Mr. Untermeyer, counsel for the Pujo Committee, joined in Brandeis's assessment of the impact of the proposed bill. He remarked:

> I think there is a grave question as to whether a director in a great life insurance company should be a director in a bank. You have failed to cover that feature. [*Id.* at 823.]

Thus, as far as the initial Clayton Bill went, it is significant that despite the recommendations of the Pujo Committee and Brandeis, no explicit prohibition of interlocking directorates between banks and insurance companies was included.

2. *The subsequent House bill.* At the conclusion of the Trust Hearings, the bill that was to become the Clayton Act, H.R. 15657, as introduced by Congressman Clayton, was referred to the House Judiciary Committee. Section 8 of this bill dealt with director interlocks and contained substantive prohibitions which were generally parallel to the prohibitions contained in the original Clayton Bill. The first paragraph prohibited interlocking relationships between common carriers and other companies with which carriers might do business. Paragraphs two and three prohibited horizontal interlocks among banks, banking associations and trust companies that had deposits capital, surplus and undivided profits of more than $2,500,000 or which were located in the same town if that town had

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[15] More specifically, section 1 of the bill prohibited officer and director interlocks between railroads or other public service corporations and certain other companies that were in the business of selling or manufacturing certain types of railroad equipment, or mining coal, or conducting the business of banks or trust companies. Section 2 forbade interlocks between banking organizations. Section 3 provided criminal penalties for violations of the first two sections. Section 4 established a conclusive presumption of a violation of the Sherman Act from the existence of an interlocking directorate among competing corporations in commerce. The full text of this bill is set out in Appendix A to Defendants' Opening Brief.

more than 100,000 inhabitants. The fourth paragraph of this bill provided:

> . . . no person at the same time shall be a director in any two or more [competing] corporations engaged in whole or in part in [16] commerce, other than common carriers. . . .

This was the first instance in which the crucial language of exclusion, "other than," appeared in the fourth paragraph of section 8. Significantly, throughout the subsequent debates and legislative reports, no doubt was ever expressed that the effect of this clause was other than to exclude common carriers from this part of section 8. [17]

3. *The House Report and initial House debates.* The House Report [18] accompanying H.R. 15657 highlighted the precise division of section 8's (then section 9's) individual paragraphs and referred to the provision here in question as affecting "industrial corporations" as distinct from "banks:"

> This section is divided into three paragraphs, each of which relates to the particular class of corporations described, and *the provisions of each paragraph are limited in their application to the corporations belonging to the class named therein.*
>
> The first paragraph deals with the eligibility of directors in interstate railroad corporations. . . . The second paragraph of the bill deals with the eligibility of directors, officers, and employees of banks, banking associations and trust companies.
>
> The third paragraph of section 9 deals with the eligibility of directors in *industrial corporations* engaged in commerce. . . . In this, as in the preceding paragraph relating to *banks*, it was not

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[16] The full text of H.R. 15657 is set out in Appendix B to Defendants' Opening Brief.

[17] See e.g., Remarks of Representative Sherley and Representative Mann excerpted from 51 Cong. Rec. 16271-16273 and set forth in relevant part at pp. 23-25 *infra*.

[18] H.R. 15657 was eventually reported to the House with certain minor changes: the interlocking directorate section was renumbered section 9: the banking provisions were modified by the addition of three exceptions: and, a $1,000,000 size requirement was added to the provision in the fourth paragraph.

> deemed advisable or necessary that inerlocking directorates should be prohibited between the smaller *industrial corporations*. (H.R. Rep. No. 627, 63d Cong., 2d Sess. 18-19 (1914) (emphasis added.)

The House Debate following the introduction of H.R. 15657 further crystallized the statutory distinction between the classes of business organizations which were to be subject to regulation under what is now section 8. In discussing the size requirements of the provisions regulating interlocking directorates among banks, two Congressmen engaged in the following colloquy:

> Mr. Graham of Pa.: The gentleman does not mean that the two million and a half exemption has any application to industrial corporations?
>
> Mr. Carlin. Oh, no; we apply an entirely different rule to industrial corporations. [51 Cong. Rec. 4272 (1914).]

In later debate on this section at a time when it did not include the exclusionary phrase "other than banks, banking associations, and trust companies," a question was raised as to whether "the industrial corporations" paragraph would have any application to banks:

> Mr. Cullop. That [paragraph] refers to some other corporation than a bank. That does not apply to a bank. If the gentleman from Massachusetts [Mr. Phelan] and the gentleman from Arkansas [Mr. Floyd] will observe, commencing on line 24 of page 29, the language is:
>
> > That from and after two years from the date of the approval of this act no person at the same time shall be a director in any two or more corporations, either of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part with commerce.
>
> *This has no reference to the banking business, but to other affairs.*
>
> Mr. Carlin. That related to industrial commerce.
>
> Mr. Cullop. Yes, that does not relate to banking. That relates to industrial and commercial corporations, or institutions of that kind, but has no reference whatever to the banking business. *Id.* at 9604. (Emphasis added.)

4. *The Senate proceedings*. H.R. 15657 underwent significant change upon being sent to the Senate. The Senate Committee on the Judiciary substantially revised the common carrier provisions of the House bill. Moreover, it completely eliminated the entire banking provision in 15657, stating that the regulation of interlocking directorates involving banks should be accomplished by amendment of the banking laws. *See* S. Rep. No. 698, 63d Cong., 2d Sess. 48 (1914). Significantly, however, the Senate Committee deliberately left the House provision "relating to interlocking directorates of industrial corporations" completely intact. *Id.* at 14-16. Thus, it seems clear that the Senate also thought that the "industrial corporation" paragraph did not apply to banks.

The Senate version of the bill passed the Senate on September 7, 1914. The House refused to accept the Senate's amendments and the bill went to the Conference Committee. At this juncture neither the House nor Senate versions of what is now section 8 of the Clayton Act contained the "other than banks" language here in issue.

5. *The Conference Committee*. The Conference Committee restored, with certain changes,[19] the House's banking provisions, placed the common carrier prohibition in a separate section (section 10), and added "banks, banking associations, and trust companies" to the "other than" clause contained in the fourth paragraph of section 8. Nothing in the Conference Report explains the reasons for these changes. These changes were, however, the subject of considerable House debate.

6. *Further House debate*. On October 7, 1914, the Conference Report was read to the House along with a statement of the changes that were made. Immediately after the reading of these documents, Representative Mann raised a "point of order" against the Conference Report arguing that the expansion of the "other than" clause to include

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[19] One significant change is that the size limitation of section 8's prohibition against interlocking directorates among banks was raised from $2,500,000 to $5,000,000. In addition, it appears that the Conference Committee also renumbered what was section 9 of H.R. 15657, and what the Senate had numbered as section 7, to section 8, which it has remained to this day.

"banks, banking associations, and trust companies" was tantamount to a material change in the proposed legislation, and thus in excess of the conferees' authority. He stated:

> The House . . . passed section 7 prohibiting interlocking directorates of all corporations having a capital of over a milllion dollars . . . if it affected competition or they were competitors, and the Senate agreed to identically the same language. . . . *What the conferees have done is to eliminate from this section all banking corporations*. [51 Cong. Rec. 16269.]
>
> I know of nothing more vital which was before the House than the power and right to prevent interlocking directorates of banks. Here was one of the issues that has been more discussed than any other by the great committee of the House which sat for weeks and months — that so-called Untemeyer committee or the Pujo committee. That was one of the basic things that the committee made findings on and when this bill was prepared it provided a prohibition against interlocking directorates of banks. The House passed it in that shape. The Senate passed it in that shape. But the House Conferees, without authority and over and beyond any jurisdiction granted to them, have provided that banks shall no longer be controlled by the prohibition of interlocking directorates where banks are in competition.
>
> So I say, that the conference report should be rejected as subject to a point of order. [51 Cong. Rec. 16270.]

Two other Congressmen, Mr. Webb of North Carolina, one of the members of the Conference Committee, and Mr. Sherley of Kentucky, responded to Representative Mann's argument. Mr. Webb stated:

> The conference . . . put in "banks and banking associations" in order to make perfectly clear what in my opinion is already clear; because of the preceding paragraph we had passed in a section with reference to interlocking directorates of banks, and there we made the limitation $5,000,000. Now it would be idiotic to say that we included also banks and banking associations in the paragraph referring to industrial corporations; and in order to make the paragraph perfectly plain, we inserted "other than banks, banks associations" and common carriers, which had no effect upon the meaning of that section. . . . [51 Cong. Rec. 16271.]

The remarks of Congressman Sherley are also relevant here:

> Now what confronted the conferees? The House had provided that the provisions touching interlocking directorates should apply to three classes — common carriers, banks and industrial corporations. The Senate had seen fit to eliminate the banks. That left in issue the material point of whether banking corporations should be brought within the provisions of the law prohibiting interlocking directorates. The House insisted on its provision, and was successful in its insistence with one or two minor changes. The House had limited the provision as to banks by making it apply to banks with a capital stock of two and a half million dollars.
>
> The conferees agreed that it should apply to banks with capital and surplus of $5,000,000. *In other words, The House conceded something by making the group smaller and requiring the banks to have large capital and surplus, and the Senate conceded something by including banks in it at all.* That was a perfectly proper subject for consideration and determination, but evidently in reading the language of the act as it had been originally passed by the House, and as it had been incorporated in part by the Senate in section 7, the question was raised as to whether it was not possible that section 7 might be held to apply to banks.
>
> Now, it is perfectly clear to my mind that no court would have so held, because having expressly dealt with banks with a capital stock of two and a half million dollars, when you come to deal with industrial corporations of $1,000,000 any court would hold that the inclusion by name of banks and trust companies in one instance excluded them from general provisions in the other, and in addition, banks and trust companies are not such corporations [that are in competition with industrial corporations]. The conferees having redrafted the matter, having gotten away from the language of section 9 of the House and section 7 of the Senate in many particulars concluded that it would leave no matter of argument touching the language of section 7 *and therefore the conferees inserted in the exclusion proviso what would have been held as excluded in the bill agreed to in conference even if not put there, to wit "banks, banking associations, and trust companies," thus making it plain by the very expression itself that they, along with common carriers, were not within the group outlined as industrial corporations.* [51 Cong. Rec. 16271-16272. (Emphasis added).]

These explanations were not, however, satisfactory to Mr. Mann. He rejoined as follows:

> Mr. Speaker, I do not think the gentleman from North Carolina or the gentleman from Kentucky quite appreciate what the House did in the bill which it passed, and yet they should know more about it than I do.
>
> . . .
>
> [Section 7 of the original House bill] applies to all corporations except common carriers subject to the act to regulate interstate commerce and forbidding any person to be a director in two corporations either one of which has a capital over a million dollars. That applies to a director in a bank and a director in a manufacturing institution. That prohibits a director of a bank with a capital of million dollars in New York City being also a director in the Sugar Trust Company or in any other company. That provision would have prevented Mr. Gary, an officer of the United States Steel Corporation, from being a director in a bank. He has recognized that far enough, supposing it would become a law, according to newspaper reports, by resigning from these and other directorates. *That provision was not limited as to any corporation with a capital of over a million dollars except as to common carriers, and the common carrier* provision is otherwise provided for by law. It extended to banks, to industrial corporations, to all kinds of corporations. The gentleman from Kentucky and the gentleman from North Carolina both said it applied only to industrial corporations. I do not know where they get a warrant for that. It is not in the bill.
>
> . . .
>
> . . . There was no place in the bill except section 7 where there was a prohibition against a director of an industrial corporation being also the director of a bank. It certainly will not be contended by anyone on the floor of this House that after the Money Trust investigation, which cost such a large sum of money and which excited so much attention, an antitrust bill was passed through this House without any prohibition against a bank director also a controlling an industrial corporation to which his bank was loaning money or that an industrial corporation with bank deposits could have as a director in that bank one of its own directors, who should control the supply of money which was being deposited. [51 Cong. Rec. 16272 (emphasis added.)

At the close of Mr. Mann's speech, the following question was put to him from the floor.

> Take another case, where a large banking institution has directors who are also directors of a large manufacturing institution. What would be the effect in that case?

Mr. Mann responded,

> If the language as perfected by the House and the Senate *goes into effect without the change made by the conferees*, there would be a provision against men acting as directors of a bank and a hat company, if there were any sort of competition. Of course, this bill does not apply to railroad companies [common carriers] engaged in commerce. [51 Cong. Rec. 16272-73 (emphasis added).]

This exchange was followed by a few more questions from the Speaker, after which, the Speaker indicated he was ready to rule on Mr. Mann's point of order.

> The Chair is ready to rule. In passing on this point of order, of course, *the Chair has nothing to do whatever with the wisdom or advisability of this legislation* in whole or in part. The only question is, Did the Conferees exceed their authority by this language which they put in as amendment by the conferees to Senate amendment number 43. The words added by the conferees are these: "banks, banking associations, trust companies, and." It is well established and everybody who has paid any attention to it knows it, that the conferees cannot go out and drag in new subjects of legislation.. . . [Now in the instant case,] the House passed a bill regulating [interlocking directorates of banks]. The Senate struck it all out. The House never agreed to the Senate amendment striking out the House language. Therefore, in the judgment of the Chair without elaborating this opinion . . . *that subject was lawfully before the conferees. If any gentleman does not like the conference report, he has his remedy — to vote against it*. The chair thinks the conferees did not exceed their authority, and the point of order is overruled. [51 Cong. Rec. 16273.]

Further debate not relevant here, followed the Speaker's ruling, and the bill was passed the next day, and then enacted into law on October 15, 1914.

8. *Summary and evaluation of legislative history*. We draw the following conclusions from the foregoing description of legislative history. Notwithstanding Representative Mann's plea to the contrary, there is considerable evidence that, even ignoring "the other than banks" language, Congress never intended the fourth paragraph of section 8 to apply to banks. Yet, even assuming this evidence to be inconclusive, there can be no doubt that the insertion of the "other than banks language" into the fourth paragraph of section 8 had the effect of completely excluding banks from that section's prohibition. This is expressly acknowledged by Representative Mann, who accuses the Conference Committee of exceeding its authority by inserting that phrase. It is clearly the view of Congressmen Webb and Sherley, who would have interpreted section 8 in this manner even without the "other than banks" language. It is implicitly acknowledged by the House Speaker, who after hearing the above-mentioned Congressmen debate the propriety of inserting this language, overruled Representative Mann's point of order, cautioning that the ruling should in no way be construed as an indication of the Speaker's view as to the wisdom or advisability of passing the bill. Moreover, the use of similar language in conjunction with common carriers has clearly had the effect of excluding that particular type of company from paragraph 4's reach. In short, there is not one statement by anyone in Congress that supports the Government's argument that the "other than banks" language meant only to exclude bank/bank interlocks but not bank/nonbank interlocks. To the contrary, the legislative history shows that there were serious efforts made by the Senate to block the regulation of even bank/bank interlocks. Only the compromise described by Congressman Sherley was able to get that part of section 8 through Congress. Accordingly, it seems clear that the Senate, if not the House, would never have agreed to have enacted section 8 if it thought that banks were to be regulated in the fourth paragraph of section 8, as well as in the first three.

We note that the Government attaches far less significance to the foregoing descriptions of legislative history. It instead emphasizes the background from which section 8 grew. *See* pp. 16-17 *supra*. It particularly stresses the House and Senate Report's incorporation of President Wilson's message on interlocking directorates in which

he demanded legislation to prohibit interlocking directorates among "banks and railroads, industrial, commercial and public service bodies." *See* p. 16 *supra*.

These are, however, the same sources which Congressman Mann unsuccessfully relied upon in arguing to the House that the "other than banks language" be removed from section 8. *See* pp. 22, 25 *supra*.

The Government also questions the inferences and conclusions which we draw from the legislative history. It argues that statements made in legislative debate are peculiarly unreliable in determining Congressional intent. *See United States* v. *Sears Roebuck & Co.*, 111 F. Supp 614 (S.D. N.Y. 1953). *See also Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 395 (1951) (Jackson, J. concurring). We are aware of the problems which the courts in those cases described and experienced in interpreting legislative history; nevertheless, it is the opinion of this court that the legislative history underlying section 8 is not susceptible of the same double meaning and ambiguities that confronted those courts. [20]

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[20] In contrast, for example, to the legislative history at issue in the *Sears Roebuck* case, the House Debate previously described and subsequent overruling of Congressman Mann's point of order are very instructive as to the meaning of the "other than banks" language in section 8.

The *Sears Roebuck* case was the first instance in which a court was called upon to construe the meaning of the competition requirement in the fourth paragraph of section 8:

> No person . . . shall be a director in any two or more corporations . . . if such corporations are or shall have been . . . competitors so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

Defendants there contended that this language should be read to require a finding that a hypothetical merger between two corporations would violate the antitrust laws before the prohibition of section 8 would be applicable. In support of this contention defendants relied primarily upon the statements and conduct of Senator Cummings of the Committee on the Judiciary during the Senate debates on section 8. In arguing against the inclusion of the "so that" clause in the bill, Senator Cummings stated "[this clause] means practically that if a consolidation of the corporations would be a violation of the antitrust laws, then interlocking directorates are made unlawful." 51 Cong. Rec. 14256. No other member of the Senate stated his agreement or disagreement with Senator Cummings' view as to the meaning of this

Finally, the Government argues that even assuming that the legislative history does reflect a Congressional intention to treat banks differently than the "industrial corporations," which clearly are subject to the prohibition of paragraph 4 of section 8, this differential treatment resulted solely from Congress's feeling that banks were not subject to Congress's Commerce Clause power. Hence, relying on

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clause. A week later, Senator Cummings offered the following amendment to section 8, which was defeated that day by a 44 to 15 vote, with 37 not voting.

> It shall be unlawful for any person to be at the same time, a member of the board of directors, or other managing board, or an officer of two or more coporations, either of which is engaged in commerce, and which corporations are carrying on business of the same kind or competitive in character: *Provided*, That this paragraph shall not apply to banks, banking institutions or common carriers. [*Id.* at 14534.]

Judge Weinfeld accordingly noted the problems with speculating whether Congress defeated the bill because it agreed with Senator Cummings earlier interpretation of section 8 and intended the bill to have that effect: First, no member of Congress ever expressed any opinion on whether Senator Cummings' interpretation of section 8 was correct. Second, the bill that he proposed changed the interlocking directorates provision in many respects: It eliminated the $1,000,000 requirement; it proscribed interlocks between officers as well as directors; and, it only required one of the corporations to be involved in interstate commerce. Accordingly, a vote against Senator Cummings' amendment could have simply been indicative of Congress's displeasure with any or all of these changes.

By way of contrast, Congressman Mann's point of order sparked extensive debate in which all parties that spoke concurred in his suggestion that the "other than banks" language had the effect of removing banks from the prohibition of section 8's fourth paragraph. The only question which was argued was whether the decision to insert this language was in excess of the Conference Committee's authority. After extensive debate on this issue, the Speaker of the House overruled Representative Mann's point of order. It is, of course, theoretically possible that this point of order was overruled because Representative Mann's interpretation of the "other than banks language" was not thought to be correct. This is, however, extremely unlikely since, as just described, no member of Congress ever made this contention, and all those who participated in the debate concurred with Congressman Mann's characterization of the language's effect. Moreover, unlike Senator Cummings' amendment which addressed four different points, Representative Mann's point of order was raised solely with regard to the propriety of inserting the "other than banks" language into the bill.

Trans-America Corp. v. *Board of Governors*, 206 F.2d 163 (3d Cir.) *cert. denied* 346 U.S. 901 (1953), the Government argues that as long as it is now established that banks can be regulated pursuant to the Commerce Clause [21] and that Congress intended to exercise its commerce clause power to the fullest extent possible, [22] then it is irrelevant whether Congress, at the time the Clayton Act was enacted, contemplated that banks would be reachable under that power. While that is the teaching of *Transamerica*, the finding there that banks were corporations engaged in commerce and therefore within the purview of section 7, was predicated upon the fact that the "sweep [of section 7] includes all 'corporations engaged in commerce' without exception." 206 F.2d at 165. Section 8, however, unlike section 7, does not "include all corporations engaged in commerce without exception." Banks, banking associations, trust companies and common carriers are specifically excepted. Moreover, to argue that banks were specifically excluded from section 8 solely because of Congress's feeling that they were not subject to regulation under the commerce clause overlooks the following facts: First, Congress did not so specifically exempt banks from section 7, which was passed at the same time as section 8; and second, Congress specifically excepted common carriers from the fourth paragraph of section 8 in the same clause in which banks were excepted, though common carriers were clearly subject to Congress's Commerce Clause power.

Thus, we are not persuaded that our reliance on section 8's legislative history is misplaced.

E. Public policy arguments

Underlying all the Government's arguments regarding the proper manner in which to interpret the fourth paragraph of section 8 is their contention that to interpret section 8 as excepting bank/nonbank interlocks would leave a loophole in the statute which itself was in part designed to plug gaps that existed in the Sherman Act. *See e.g.*,

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[21] *See United States* v. *Philadelphia Nat'l Bank, supra.*

[22] Relying on the words "engaged in whole or in part in commerce" the Government argues that this was Congress's intent in enacting the fourth paragraph of section 8.

Brown Shoe Co. v. *United States*, 370 U.S. 294, 318 n.32 (1962). Thus, the Government argues Congress could not have intended to create such an exception which would be both contrary to public policy and the overall purpose of section 8 to alleviate and address the widespread public concern over the anticompetitive effects of the nation's vast interlocking directorates.

However, as is apparent from our description of the legislative history underlying section 8, Congress's decision to except banks, banking associations, trust companies and common carriers from section 8 does not appear to have been inadvertent. Moreover, contrary to the Government's argument, there are legitimate public policies to be served from excepting banks and insurance company interlocks from section 8's prohibition. As Arthur Burns, Chairman of the Federal Reserve Board, testified before Congress:

> [E]conomic benefits flow from a high standard of performance by corporate boards of directors. This entails a free exchange of advice, ideas, and experiences among directors of varied backgrounds. Bankers often have valuable experience and expertise that qualify them to render valuable service in this role. Interlocking directorates, in other words, are not inherently wrong. They may be good for the corporations involved and the public they serve. The problem is to define those situations where the risk of abuse outweighs the expectation of benefit. (Letter of Dr. Arthur Burns to Wright Patman, Ch. House Comm. on Banking Currency, Dec. 16, 1970, quoted in Hearings on H.R. 5700 Before the House Comm. on Banking and Currency, 92nd Cong., 1st Sess. 481 (1971).)

Defendants further emphasize that the need for competent directors with solid financial backgrounds is particularly acute in the case of insurance companies. These companies are entrusted with funds of millions of policyholders. The obligation to pay benefits to the policyholders may not mature for periods as long as 50 years. It is the responsibility of the directors of insurance companies to ensure that funds of their policyholders are prudently invested to permit the companies to meet such obligations and to provide the financial security which their policyholders seek. Hence it is essential that the board of directors of insurance companies include individuals who have investment experience, particularly in the lending area, and who can exercise expert judgment concerning the investment activities of

the company. Accordingly, categorically banning directors of banks and other lending institutions from serving on the boards of directors of insurance companies could clearly reduce the number of qualified directors, possibly to the detriment of the public at large.

This is not to say, of course, and this court does not intend to suggest, that other factors do not exist that could nevertheless justify prohibiting the "bank interlocks" challenged here. However, arguments of this kind are more properly directed at Congress than at this court. While this court itself might not have chosen to except bank/insurance interlocks from federal regulation, the language of section 8 is neither so ambiguous nor purposeless that this court can do other than to give it the effect that Congress has intended.

F. Summary

It is apparent from the plain language of the statute that the fourth paragraph of section 8 of the Clayton Act does not apply to the bank/insurance company interlocks challenged here.[23] While this may itself be controlling, *see e.g., United States* v. *Oregon*, 366 U.S. 648 (1961), this interpretation is further confirmed by 60 years of administrative and Congressional interpretation, as well as by the legislative history underlying section 8. In so holding, we are not unmindful of the general rule that "immunity from the antitrust laws is not lightly implied." *United States* v. *Philadelphia Nat'l Bank*, 347 U.S. 321, 348 (1963). However, given the express language of section 8, we question whether we are "implying" the immunity of banks from the fourth paragraph of section 8. Moreover, even if we are so implying such immunity, we think there is more than a sufficient basis in the record to justify this action.

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[23] We, of course, intimate no views as to whether these interlocks could successfully be attacked as Sherman Act violations or as violations of section 5 of the Federal Trade Commission Act. *See generally*, Travers, "Interlocks in Corporate Management and the Antitrust Laws," 46 *Texas L.Rev.* 819, 848 (1968); Jacobs, "Interlocks," 29 *A.B.A. Antitrust Section* 204, 212 (1965).

II. Are Director Interlocks Between Bank Holding Companies And Insurance Companies Prohibited By Section 8 Of The Clayton Act?

As was true with respect to "bank interlocks," the Government's attack on the instant "bank holding interlocks" is founded solely upon the prohibition contained in the fourth paragraph of section 8 of the Clayton Act. Accordingly, the stipulated record concedes the existence of the challenged interlocks, the requisite amount of capital, and the companies' engagement in interstate commerce. *See* notes 2-4 *supra* and accompanying text. The primary question presented by this phase of the Government's suit is whether the defendant companies "are or shall have been theretofore, by virtue of their business and location of operation, competitors, *so that* the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws."

The Government's first and most basic argument in this regard is that since the defendant corporations are capable of entering into an anticompetitive agreement (for example, to fix interest rates) they are competitors. This argument, however, is based upon the erroneous theory that the "so that" clause of section 8 defines competitors as "two corporations which could enter into an agreement to eliminate competition and thereby violate the antitrust laws." Gov't Reply Brief, p. 51.

An examination of the relevant statutory language set forth above reveals that the "so that" clause does not purport on its face to be, and is in fact not, a definition of the term competitors. Moreover, were that clause to be interpreted as defining the term "competitors," it would lead to the analogous result of declaring companies with vertical relationships, such as manufacturers and distributors, to be competitors.

The real purpose of the "so that" clause seems to have been the establishment of a *per se* rule that interlocking directorates among competing corporations (that otherwise meet the requirements of the fourth paragraph of section 8) are illegal. *See* 16B Von Kalinowski, *supra*, at § 20.02[2], p. 20-19. Section 8 of the Clayton Act was intended to nip in the bud incipient antitrust violations by removing

the opportunity or temptation for such violations through interlocking directorates. *United States* v. *Sears Roebuck & Co.*, 111 F. Supp. at 616. Thus, in furtherance of this purpose, Congress sought to avoid questions as to whether the competition which interlocking directorates could potentially restrain was substantial or de minimus. As long as corporations were "competitors" and otherwise satisfied the criteria set forth in section 8, they could not simultaneously employ the same director. Whether two corporations were, in fact, competitors was apparently to be determined according to the traditional tests of competition — common sales in the same *product* and *geographic* market. This is the import of the phrase "by virtue of their *business* and *location* of operation."

Here, the stipulated record removes the need to examine these specific criteria. It reveals that the bank holding companies by themselves or through their subsidiaries, *other than the bank defendants named herein*, are not competitors of any of the insurance company defendants so that the elimination of competition by agreement between them would constitute a violation of one or more of the provisions of the antitrust laws. *See* note 6 *supra* and accompanying text. Hence, the Government's second and only other argument in support of its attack on the bank holding interlocks is that the activities of the bank holding companies' subsidiary banks are sufficient to make the bank holding companies themselves competitors of the insurance company defendants. The government relies on the following portions of the stipulated record in making this argument.

It notes first that the bank defendants named in these suits are conceded to be competitors within the parameters required by section 8. *See* note 4 *supra* and accompanying text. It further notes that the bank holding defendants are bank holding companies registered under the Bank Holding Company Act as amended 12 U.S.C. §§ 1841-44, thus, establishing the fact that they control their subsidiary banks. *See* note 5 *supra* and accompanying text. By virtue of this control, the Government contends the activities of the subsidiary banks must be attributed to their holding companies, thereby making them competitors of the insurance company defendants.

Defendants dispute that the control which the holding companies have over their banks is sufficient to attribute the operations of those banks to the holding companies. Defendants argue that while the stipulated record concedes that the bank holding companies control their subsidiaries by and through the ownership of those subsidiaries' stock and the election of all of their subsidiaries' directors, the record also reveals that it is the bank officers, and not the bank directors, who control the daily operations and activities of the banks. *See* note 6 *supra* and accompanying text. It is defendants further contention that in order to attribute the banks' operation to their holding companies, the holding companies must be shown to control their subsidiaries' day-to-day operations, and that the record does not provide a sufficient basis from which such a showing could be made.

We need not, however, resolve this issue. Even assuming that the control which the bank holding companies exercised over their subsidiary banks was sufficient to attribute the subsidiary banks' activities to their parents, it seems that the subsidiaries' status as banks, and hence their exemption from the fourth paragraph of section 8, should similarly be attributed to those parents. As the Government makes clear in oral argument, its attack on the "bank holding interlocks" is predicated upon, and is subordinate to, their attack upon the "bank interlocks." *See* Transcript, pp. 45, 59. The Government argues that if there is to be an injunction against bank and nonbank interlocks, it would be anomalous not to also enjoin the bank holding interlocks given the measure of control which exists. *Id.* at 59. Similarly, the Government in effect concedes that, if this court decides that section 8 *does not* apply to the challenged bank interlocks, it would be anomalous to conclude that section 8 applies to the bank holding interlocks. *See* Transcript at 45-46. [24] Otherwise, it would mean that interlocks

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[24] The only qualification which the Government offered in this regard concerned the possibility that if an exemption for banks from the fourth paragraph of section 8 was the result of Congress's inadvertent or unwitting action, then it would not necessarily be anomalous to have applied the fourth paragraph of section 8 to the bank-holding interlocks. However, as is set forth in our discussion of the bank interlock question, the exemption of banks from the prohibition of the fourth paragraph of section 8 was neither inadvertent nor unwitting.

between banks and directly competing insurance companies would be lawful by virtue of the "other than banks" language of the fourth paragraph of section 8, but that interlocks between bank holding and insurance companies involving only vicariously attributed indirect competition would be prohibited. Accordingly, we hold that if the activities of the defendant subsidiary banks are required to be attributed to their parents, so too must their status as banks, and hence their exemption from the fourth paragraph of section 8. We further note that this type of attribution of a subsidiary bank's status to its parent is not without precedent. For example, pursuant to its authority to promulgate rules and regulations to effectuate the provisions of section 8 of the Clayton Act, *see* 15 U.S.C. §§ 19, 21(a), the Board of Governors of the Federal Reserve Board has already issued regulations which treat bank holding companies as banks for some purposes of section 8. *See* 12 C.F.R. 212.102. *See also* 12 C.F.R. 212.101.

Thus, under the circumstances of this case, we hold that the challenged bank holding interlocks do not violate section 8 of the Clayton Act. [25]

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[25] In so holding, we do not decide the broader question of whether section 8 generally applies to indirect interlocks.

Indirect interlocks generally fall into three categories: (1) Those, as here, where the interlock is direct but the alleged competition is indirect in that it is based solely on the operation of a separate, but affiliated corporation; (2) those where the interlock is indirect, but the alleged competition is direct; and (3) those where both the interlock and the alleged competition is indirect. To be sure, most courts, commentators, and administrative and Congressional bodies who have considered this question have concluded that section 8 does not reach indirect interlocks. *See e.g., Paramount Pictures Corp.* v. *Baldwin Montrose Chem. Co.*, 1966 Trade Cases ¶ 71,678 (S.D.N.Y. 1966); *United States* v. *Sears Roebuck & Co.*, 165 F. Supp. 356 (S.D.N.Y. 1958); 16B Von Kalinowski *supra* at § 20.02[3][a]; Kramer, "Interlocking Directorates and the Clayton Act After 35 Years" 59 *Yale L.J.* 1226, 1274 (1950); Travers, "Interlocks in Corporate Management and the Antitrust Laws," 46 *Texas L. Rev.* 819 (1968); Jacobs, "Interlocks" 29 *A.B.A. Antitrust Section* 204, 212 (1965); Report of the Federal Trade Commission on Interlocking Directors, H.R. Doc. No. 652, 81st Cong., 2d Sess., pp. 10,14,15,18 (1950); Staff of House Committee on the Judiciary (Antitrust Subcommittee), 89th Cong., 1st Sess., Report on Interlocks in Corporate Management (Comm. Print 1965). *See also* H.R. 11572, 89th Cong. 1st Sess. (1965). *But see Schectmann* v. *Wolfson* Civ.

III. The Remaining Issues

In view of our disposition of the first two issues discussed, it is apparent that defendants' motions for summary judgment must be granted. Accordingly, we need not reach and therefore will not discuss in any detail the remaining issues that these motions present except to quickly note our disagreement with defendants' position with respect to these issues should they become relevant on appeal.

A. Are corporations subject to the prohibition of the fourth paragraph of section 8?

Defendants contend that section 8 only proscribes a "person" from serving as a director of two or more competing corporations, and that it does not apply to either of the two corporations whose stockholders or policyholders may have separately and independently have elected the same person to serve as a director on their respective boards. [25] Regardless of whether this contention is correct, [27] it is clear, and the

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No. 105-300, (S.D.N.Y. Jan. 1956) mentioned without comment in *Schectmann* v. *Wolfson*, 244 F.2d 537 (2d Cir. 1957). Though these conclusions are probably correct with respect to the types of indirect interlocks described as (2) and (3) above, we entertain some doubts as to whether they are necessarily correct with regard to all type (1) indirect interlocks.

For example, in attacking the bank holding interlocks at issue here, the Government relies on the express language of section 8. It contends that the bank holding company defendants are competitors of the insurance company defendants by virtue of their business; to wit, the business of being a bank holding company and controlling the operations of its subsidiary banks. Thus, were this court of the opinion that the underlying bank interlocks challenged here were illegal, it would seem that a strong case could be built for holding that section 8 reached this particular type of indirect interlock as well. *See Kramer* supra at 1268 n.11.

Also *see* note 22 *supra*.

[26] Although section 1 of the Clayton Act defines "person" so as to include corporations as well as natural persons, defendants note that the explicit language of section 8 limits the prohibition to a "person" who is a "director" in two competing corporations. There is no contention here that any of the defendant corporations are actually "directors."

[27] The United States Supreme Court explicitly left this question unresolved in *United States* v. *W.T. Grant & Co.*, 345 U.S. 629, 635 n.9.

defendants conceded at oral argument, [28] that were this court to decide that injunctive relief were appropriate in these cases, this court could, if it chose to, enjoin the defendant corporations, as well as the individual defendants from further violating section 8. *See e.g.*, 15 U.S.C. § 25.

B. Are the challenged interlocks immunized from prosecution under section 8 of the Clayton Act by virtue of the antitrust exemption provided in the McCarran Fergurson Act, 15 U.S.C. §§ 1011-1015?

The McCarran Fergurson Act exempts the business of insurance from federal regulation to the extent that is regulated by the states. Here, the McCarran Fergurson exemption is not applicable since the selection of directors to insurance companies are not acts so "peculiar to the insurance industry" as to come within the meaning of the business of insurance as used in the McCarran Fergurson Act and cases interpreting that statute. *See American Family Life Assurance Co.* v. *Planned Mktg. Assoc. Inc.*, 389 F. Supp. 1141 (E.D. Va. 1974). *See also SEC* v. *Nat'l Securities Inc.*, 393 U.S. 453 (1969); *DeVoto* v. *Pacific Fidelity Life Insurance Co.*, 354 F. Supp. 874 (N.D. Ca. 1973) *aff'd* (and revs'd on other grounds) 516 F.2d 1 (9th Cir.) *cert. denied* 44 USLW 3229 (1975); *American General Insurance* v. *FTC*, 359 F. Supp. 887 (S D. Texas 1973) *aff'd* 496 F.2d 197 (5th Cir. 1974).

CONCLUSION AND ORDER

For the reasons set forth in this opinion, it is hereby ordered that defendants' motion for summary judgment be granted.

IT IS SO ORDERED.

Dated: August 26, 1976

/s/ ROBERT F. PECKHAM
Robert F. Peckham
United States District Judge

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[28] *See* Transcript at 62.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-3614

UNITED STATES OF AMERICA,
Plaintiff-Cross-appellee,

v.

CROCKER NATIONAL CORP., *et al.*,
Defendant-Cross-appellants.

No. 76-3615

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

CROCKER NATIONAL CORP., *et al.*,
Defendant-Appellees.

No. 76-3692

UNITED STATES OF AMERICA,
Plaintiff-Cross-appellee,

v.

BANKAMERICA CORPORATION, *et al.*,
Defendants-Cross-appellants.

No. 76-3738

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

BANKAMERICA CORPORATION *et al.*,
Defendants-Appellees.

ORDER

Before: BROWNING, Chief Judge, KENNEDY, Circuit Judge, and CHRISTENSEN,* District Judge

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The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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* Honorable A. Sherman Christensen, Senior Judge, United States District Court for the District of Utah, sitting by designation.

SECTION 8 OF THE CLAYTON ACT (15 U.S.C. § 19)

§ 19. Interlocking Directorates And Officers

No private banker or director, officer or employee of any member bank of the Federal Reserve System or any branch thereof shall be at the same time a director, officer, or employee of any other bank, banking association, savings bank, or trust company organized under the National Bank Act or organized under the laws of any State or of the District of Columbia, or any branch thereof, except that the Board of Governors of the Federal Reserve System may by regulation permit such service as a director, officer, or employee of not more than one other such institution or branch thereof; but the foregoing prohibition shall not apply in the case of any one or more of the following or any branch thereof:

(1) A bank, banking association, savings bank, or trust company, more than 90 per centum of the stock of which is owned directly or indirectly by the United States or by any corporation of which the United States directly or indirectly owns more than 90 per centum of the stock.

(2) A bank, banking association, savings bank, or trust company which had been placed formally in liquidation or which is in the hands of a receiver, conservator, or other official exercising similar functions.

(3) A corporation, principally engaged in international or foreign banking or banking in a dependency or insular possession of the United States which has entered into an agreement with the Board of Governors of the Federal Reserve System pursuant to sections 601 to 604a of Title 12.

(4) A bank, banking association, savings bank, or trust company, more than 50 per centum of the common stock of which is owned directly or indirectly by persons who own directly or indirectly more than 50 per centum of the common stock of such member bank.

(5) A bank, banking association, savings bank, or trust company not located and having no branch in the same city, town, or village as that in which such member bank or any branch thereof is located, or in any city, town, or village contiguous or adjacent thereto.

(6) A bank, banking association, savings bank, or trust company not engaged in a class or classes of business in which such member bank is engaged.

(7) A mutual savings bank having no capital stock.

Until February 1, 1939, nothing in this section shall prohibit any director, officer, or employee of any member bank of the Federal Reserve System, or any branch thereof, who is lawfully serving at the same time as a private banker or as a director, officer, or employee of any other bank, banking association, savings bank, or trust company, or any branch therof, on August 23, 1935, from continuing such service.

The Board of Governors of the Federal Reserve System is authorized and directed to enforce compliance with this section, and to prescribe such rules and regulations as it deems necessary for that purpose.

No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter.

When any person elected or chosen as a director or officer or selected as an employee of any bank or other corporation subject to the provisions of this Act is eligible at the time of his election or

selection to act for such bank or other corporation in such capacity his eligibility to act in such capacity shall not be affected and he shall not become or be deemed amenable to any of the provisions hereof by reason of any change in the affairs of such bank or other corporation from whatsoever cause, whether specifically excepted by any of the provisions hereof or not, until the expiration of one year from the date of his election or employment.

Oct. 15, 1914, c. 323, § 8, 38 Stat. 732; May 15, 1916, c. 120, 39 Stat. 121; May 26, 1920, c. 206, 41 Stat. 626; Mar. 9, 1928, c. 165, 45 Stat. 253; Mar. 2, 1929, c. 581, 45 Stat. 1536; Aug. 23, 1935, c. 614, § 329, 49 Stat. 717.

LIST OF PARTIES AND THEIR CORPORATE AFFILIATES

In accordance with Rule 28.1 of the Rules of the Supreme Court, there is set forth below, with respect to each party, a list of its subsidiaries and affiliates, with the exception of those subsidiaries in which all of the shares (or, in some instances, all shares except directors' qualifying shares) are owned by the parent company and those companies in which the party's holdings are less than forty percent of the outstanding shares. The parent of each bank defendant is its bank holding company, which is also a defendant herein. The remaining corporate defendants have no parent companies.

BANKAMERICA CORPORATION AND BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION:

Kuwait Properties International
Tokyo Investment Services (International) Inc.
Decimus Computer Leasing Corporation
Decimus Corporation
Financeamerica Corporation of Minnesota, Inc.
BA Lepanto Building Corporation
Banca D'America e D'Italia
Finabai-Societe Financiere S.A.
Banco Colombo Americano
Banco International S.A.
Bank of America S.A.E.
Financiera Comercial Para America, S.A.
BA Finance Corporation (Philippines)
Bank of America S.A.E.
BA (Australia) Limited
BankAmerica Representacao e Servicos Limitada
Corporacion Financiera Asociada S.A.
Financial Group of Kuwait
Financiera de America S.A.
Jamaican American Merchant Bankers Ltd.
Ouvidor Industria e Comercio Limitada
Flower Street Limited
MISR America International Bank S.A.E.

Savannah Bank of Nigeria Ltd.
First Indo Leasing Co.

BANKERS TRUST NEW YORK CORPORATION AND BANKERS TRUST COMPANY:

Petroquimica del Atlantico S.A.
Private Export Funding Corporation
United Bank for Africa, Ltd.
Banque de Tunisie
Banque du Benelux S.A.
Thai Investment & Securities Co. Ltd.
Anscor Capital & Investment Corp.
Dole Philippines Inc.
Tun Thamrong Company Ltd.
BT Capital Corporation
UBAF Arab American Bank

CROCKER NATIONAL BANK AND CROCKER NATIONAL CORPORATION

Adela Investment Corporation S.A.
Crocker Servicos Limitada
Private Export Funding Corporation
Banque de Paris et des Pays Bas (Zaire)
Asia European American Development Corporation
P.T. Mutual International Finance Corporation

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

Equico Lessors, Inc.

METROPOLITAN LIFE INSURANCE COMPANY

Transatlantic Reinsurance Company
National Electronic Information
E.T. Barwick Industries, Inc.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

None

THE PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA

Bache Halsey Stuart (London) Ltd.
Bache Halsey Stuart Shields (France) S.A.
Bache Halsey Stuart Commodities S.A.
Bache Halsey Stuart (Hong Kong) Ltd.
Bache Halsey Stuart (U.K.)
Sony Prudential Life Insurance Company
Essex St. Syndicate, Inc.
John St. Syndicate, Inc.

Joint Appendix

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AUG 16 1982
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CLERK

No. 81-1487

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BANKAMERICA CORPORATION, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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NOTE: The relevant opinions and orders of the courts below have already been reproduced in the Appendices to the Petition for Certiorari ("Pet. App.") filed herein on February 8, 1982. The opinion of the district court appears at Pet. App. 51a-85a; the majority and dissenting opinions of the court of appeals appear at Pet. App. 1a-48a and 48a-50a, respectively; and the order of the court of appeals denying rehearing appears at Pet. App. 86a-87a.

A. Relevant Docket Entries in U.S. v. Crocker National Corp., et al., U.S.D.C., N.D. Cal., Civ. Action No. C-75-2108

DATE	NR.	PROCEEDINGS
1975		
Oct. 6	1	Complaint, issued summons.
1976		
Jan 19	8	Minute Order—Hearing on consent judgment as to Otto Miller, Hearing cont'd 3-29-76 @ 2 pm for hearing on objections to consent judgment and approval of consent judgment as to defendant Otto N. Miller
Jan 19	9	Stipulation—Final judgment may be entered by the court
Mar 15	15	Stipulation re cross motions and summary judgment, etc.
Mar 26	18	Crocker National Corp.; Crocker National Bank & Wilcox's answer
Mar 29	19	Mutual Life Insurance of NY ANSWER
	20	The Equitable Life Assurance Society of the US's ANSWER
	21	Metropolitan Life Insurance Co.'s ANSWER
	22	Emmett G. Solomon's ANSWER
April 19	24	JUDGMENT: (1) Court has jurisdiction over subject matter & parties consenting. (2) Defendant Miller is ordered to resign directorship in the defendants Crocker National Corp. & Crocker National Bank or the defendant Equitable Life Assurance Society of the US within 60 days of entry of judgment. Defendant Miller is enjoined & restrained from serving as director of Crocker National Corp.

DATE	NR.	PROCEEDINGS
1976		
		or any subsidiary, while director of Equitable Life Assurance Society etc. (3) Upon 60 days written notice to Attorney General, the defendant may file a petition for abatement or modification of judgment. (4) Court retains jurisdiction for the purpose of enabling parties to apply for further orders & directions. Final Judgment effective for 20 years from entry of judgment. Entered judgment 4-20-76
	25	MINUTES: Court ordered judgment approved being no objections.
May 7	26	STIPULATION & ORDER: Motions for summary judgment etc. will be extended as follows: 5-17-76 for summary judgment & supporting memos. 6-14-76 to file reply briefs. Hearing motions 6-25-76 @ 10 am. Final date for motions for summary judgment extended 21 days beyond stipulation on 3-15-76
May 17	28	US's notice of motion & motion for summary judgment 6-4-76 @ 10 am
		Memo
		Exhibit A
	29	Crocker National Corp. & Crocker National Bank's notice of joint motion & joint motion for summary judgment of all defendants except Otto N. Miller 6-25-76 @ 10 am
		Proposed order
		Statement of uncontested material facts
May 20	32	US's notice of motion & motion for summary judgment 6-25-76 @ 10 am
June 28	36	MINUTE ORDER OF 6-25:
		1. Cross motions for summary judgment—SUBMITTED.

DATE	NR.	PROCEEDINGS
1976		
Aug 27	40	JUDGMENT: Entered in favor of all defendants except Otto N. Miller & E. Hornsby Wasson. Cases dismissed against all those defendants in whose favor judgment is to be entered. Judgment entered 8-30-76
	41	OPINION—Defendants' motion for summary judgment be granted.
Oct 20	43	Notice of appeal by plaintiff

B. Relevant Docket Entries in U.S. v. BankAmerica Corp., et al., U.S.D.C., N.D. Cal., Civ. Action No. C-75-2109

DATE	NR.	PROCEEDINGS
1975		
Oct 6	1	Complaint, summons issued
1976		
Feb 20	10	Deft. E. HORNSBY WASSON's notice of motion to dismiss the complaint.
		Memo of law in support.
		Proposed motion
		Affidavit of E. HORNSBY WASSON
Mar 25	19	*ANSWER* of BANK AMERICA CORP. AND BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION.
	20	BANKAMERICA CORP. AND BA NAT. TRUST AND SAVINGS ASSOC.'s certificate of service by mail.
Mar 26	21	*ANSWER* of deft. THE PRUDENTIAL INSURANCE CO. OF AMERICA
	22	*ANSWER* of deft. PAUL A. GORMAN.
	23	*ANSWER* of defts. BANKERS TRUST CO. AND BANKERS TRUST NEW YORK CORP.
Mar 29	24	Stip. re certain statements of fact.
Apr 26	31	Stip. and ORDER for certain times of compliance, all parties to file motions for summary judgment by 5-17-76 (extension from 4-26-76) reply briefs to be filed by 6-14-76 etc.
Apr 28	32	Stipulation correcting date of service of Wasson

DATE	NR.	PROCEEDINGS
1976		
May 10	36	STIPULATION & ORDER: vacating conference scheduled, 5/3/76 pending case on proposed cross motions for summary judgment set—6/25/76,
May 17	38	Notice of motion and motion of plaintiff for partial summary judgment under rule 56(a)
		Memo
	39	Defendants BankAmerica, Bank Of America, Bankers Trust N.Y., Bankers Trust, Prudential & Gorman's notice of motion & motion for summary judgment, 6-25-76/10am
		Statement of uncontested material facts
		Proposed Order
May 20	42	Plaintiff's notice of motion & motion for partial summary judgment—6/25/76 @ 10:00 am
June 28	46	MINUTES (6-25-76); Plaintiff's and defendant's (cross motions) for summary judgment—submitted.
Aug 27	48	JUDGMENT: Entered in favor of defendants except Otto N. Miller & E. Hornsby Wasson & case dismissed against all defendants in whose favor judgment is to be entered. Entered judgment 8-30-76
	49	OPINION—Defendants' motion for summary judgment be granted.
	51	FINAL JUDGMENT: ENTERED—9/17/76
Oct 20	52	Notice of appeal by plaintiff

C. Relevant Docket Entries in U.S. v. Crocker National Corp., et al., U.S.C.A., 9th Cir., No. 76-3614

DATE	PROCEEDINGS
1976	
Dec 10	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL.
1977	
Jan 7	Filed order (H & KY) Upon due consideration, the court issues the following order: 1) the cases 76-3614, 3615, 3738 & 3692 are consolidated for purposes of briefing and argument . . . .
April 11	Filed 25 Aplees/Cross-Aplts' Appendix to Brief (pamphlet of statutes & regulations) 4/11/77
1978	
Nov 8	ARGUED AND SUBMITTED TO: BROWNING, KENNEDY, CJJ, A. SHERMAN CHRISTENSEN, SENIOR DJ, UTAH.
1981	
Sept 14	ORDERED OPINION (BROWNING) KENNEDY DISSENTING FILED & JUDG. TO BE FILED & ENTD.
Sept 14	FILED OPINION—REVERSED.
Sept 14	FILED & ENTERED JUDGMENT.
Sept 28	Filed deft/aple/x-aplt's petition for rehearing and suggestion for rehearing en banc. (Panel and all active judges) 9/25.
Nov 10	Filed order (BROWNING, KENNEDY & CHRISTENSEN) the petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

DATE	PROCEEDINGS
1981	
Nov 17	Filed as of Nov. 16, defts/aplts/x-aples' uncontested motion for an indefinite stay of issuance of mandate pending filing of petition for writ of certiorari. (BROWNING) 11/16
Nov 23	Filed in 76-3615, order (BROWNING) staying mandate until disposition by S. Ct. of a petition for writ of cert. provided petition is filed on or before Feb. 8, 1982.
1982	
Feb 18	*RECVD SC notice of filing petition for cert. on 2/8/82, SC#81-1487. pn*

D. Relevant Docket Entries in U.S. v. Crocker National Corp., et al., U.S.C.A., 9th Cir., No. 76-3615 (Cross Appeal)

DATE	PROCEEDINGS
1976	
Dec 10	DOCKETED CAUSE & ENTERED APPEARANCES OF COUNSEL.
1977	
Jan 7	Filed order (H & KY) Upon due consideration, the court issues the following order: 1) the cases 76-3614, 3615, 3738 & 3692 are consolidated for purposes of briefing and argument . . . . "FOR FURTHER PROCEEDINGS SEE 76-3614"

E. Relevant Docket Entries in U.S. v. BankAmerica Corp., et al., U.S.C.A., 9th Cir., No. 76-3738

DATE	PROCEEDINGS
1976	
Dec 28	DOCKETED CAUSE & ENTERED APPEARANCES OF COUNSEL.
1977	
Jan 7	Filed in 76-3615, order (H & KY) Upon due consideration, the court issues the following order: 1) the cases 76-3614, 3615, 3738, & 3692 are consolidated for purposes of briefing and argument . . . .
	"FOR FURTHER PROCEEDINGS SEE 76-3614"

A. U.S. v. Crocker National Corp., et al.

1. *Complaint*

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C 75 2108 RFP

UNITED STATES OF AMERICA,
Plaintiff,
v.

CROCKER NATIONAL CORP.; CROCKER NATIONAL BANK; METROPOLITAN LIFE INSURANCE COMPANY; THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES; THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK; OTTO N. MILLER; EMMETT G. SOLOMON; and THOMAS R. WILCOX,
Defendants.

Filed: Oct. 6, 1975

COMPLAINT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General

of the United States, brings this action against the defendants and complains and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted against the defendants under Section 15 of the Act of Congress of October 15, 1914, as amended (15 U.S.C. § 25), commonly known as the Clayton Act, in order to prevent and restrain the continuing violation by the defendants, as hereinafter alleged, of Section 8 of the Clayton Act (15 U.S.C. § 19). Crocker National Corp.; Crocker National Bank; Metropolitan Life Insurance Company; The Mutual Life Insurance Company of New York; and The Equitable Life Assurance Society of the United States conduct business and are found within this district.

II

THE DEFENDANTS

2. Crocker National Corp. (hereinafter referred to as "Crocker") is made a defendant herein. Crocker is a bank holding company organized and existing under the laws of the State of Delaware and maintains its principal place of business in San Francisco, California. Crocker has capital, surplus, and undivided profits aggregating more than $1,000,000 and is not a bank, banking association, trust company or common carrier subject to the Act to regulate commerce approved February 4, 1887.

3. Crocker National Bank (hereinafter referred to as "Crocker Bank") is made a defendant herein. Crocker Bank is a banking association organized under the laws of the United States of America, and is a wholly-owned subsidiary of Crocker. Crocker Bank maintains its principal place of business in San Francisco, California and

has capital, surplus, and undivided profits aggregating more than $1,000,000.

4. Metropolitan Life Insurance Company (hereinafter referred to as "Metropolitan") is made a defendant herein. Metropolitan is a corporation organized and existing under the laws of the State of New York and maintains its principal place of business in New York, New York. Metropolitan has capital, surplus, and undivided profits aggregating more than $1,000,000 and is not a bank, banking association, trust company or common carrier subject to the Act to regulate commerce approved February 4, 1887.

5. The Equitable Life Assurance Society of the United States (hereinafter referred to as "Equitable") is made a defendant herein. Equitable is a corporation organized and existing under the laws of the State of New York and maintains its principal place of business in New York, New York. Equitable has capital, surplus, and undivided profits aggregating more than $1,000,000 and is not a bank, banking association, trust company or common carrier subject to the Act to regulate commerce approved February 4, 1887.

6. The Mutual Life Insurance Company of New York (hereinafter referred to as "MONY") is made a defendant herein. MONY is a corporation organized and existing under the laws of the State of New York and maintains its principal place of business in New York, New York. MONY has capital, surplus, and undivided profits aggregating more than $1,000,000 and is not a bank, banking association, trust company or common carrier subject to the Act to regulate commerce approved February 4, 1887.

7. Otto N. Miller, is made a defendant herein. Mr. Miller maintains offices at 555 Market Street, San Francisco, California. Mr. Miller has been and is now a director of defendants Crocker, Crocker Bank and Equitable.

8. Emmett G. Solomon, is made a defendant herein. Mr. Solomon maintains offices at One Montgomery Street, San Francisco, California. Mr. Solomon has been and is now a director of defendants Crocker, Crocker Bank, and Metropolitan.

9. Thomas R. Wilcox, is made a defendant herein. Mr. Wilcox maintains offices at One Chase Manhattan Plaza, New York, New York. Mr. Wilcox has been and is now a director of defendants Crocker, Crocker Bank and MONY.

III

DEFINITION

10. The "corporate defendants" herein are Crocker, Crocker Bank, Metropolitan, Equitable, and MONY. Each reference herein to any one of the corporate defendants includes all subsidiaries and divisions of said corporate defendant which are not named as defendants.

IV

TRADE AND COMMERCE

11. A supply of credit is a necessary part of the trade and commerce of the United States. It is essential to the operations of state and local governments, the expansion of large industries and the establishment of small businesses. Credit in the form of mortgages and real estate loans finances the construction and purchase of commercial and industrial buildings, multiple and single family housing. Business entities that compete in the extension of credit for these purposes include commercial banks and insurance companies.

12. Life insurance companies also extend loans to policy-holders which are secured by the cash value of the life insurance policy. Such loans, known as "policy loans," compete directly with the varied loans offered by commercial banks to consumers.

13. As of December 31, 1974, Crocker Bank had total deposits of approximately $8.6 billion and total assets of $10.3 billion. The bank's lending services include the entire range of real estate, commercial and consumer loans, and are utilized by customers throughout the nation and around the world. As of December 31, 1974, it had total loans of approximately $6.3 billion, including real estate mortgage loans of more than $1.5 billion and commercial loans exceeding $3.9 billion. On the same date, the bank's installment credit totaled $890 million, which included a variety of installment loans to consumers.

14. Defendant Metropolitan has been and is now engaged in the life insurance business. It is licensed to operate in all 50 states and does a substantial volume of business in the State of California. As of December 31, 1974, it had total assets in excess of $32 billion, including outstanding mortgage loans of approximately $12 billion. Of this amount, $1.6 billion consisted of mortgage loans on real estate located in the State of California.

15. Defendant Equitable has been and is now engaged in the life insurance business. It is licensed to operate in all 50 states and does a substantial volume of business in the State of California. As of December 31, 1974, it had total assets in excess of $17.5 billion, including outstanding mortgage loans of $6.8 billion. Of this amount, $785 million consisted of mortgage loans on real estate located in the State of California.

16. Defendant MONY has been and is now engaged in the life insurance business. It is licensed to operate in all 50 states and does a substantial volume of business in the State of California. As of December 31, 1974, it had total asests in excess of $4.3 billion, including outstanding mortgage loans of more than $1.2 billion. Of this amount, $107 million consisted of mortgage loans on real estate located in the State of California.

17. Each of the corporate defendants has regularly used interstate communication, including the mails, telephone and telegraph, to conduct business with customers located throughout the United States. Customers located throughout the United States have regularly used interstate communication, including the mails, telephone and telegraph, to make deposits, to pay loans, to pay premiums, or pay accounts, to apply for and obtain credit, and obtain various goods and services made available by each of said corporate defendants. Credit advanced by the corporate defendants has been used regularly to finance interstate transactions. The corporate defendants are all engaged in interstate commerce.

18. By virtue of its business and location of operations, the defendants Crocker and Crocker Bank have been and are now in competition with each of the other corporate defendants in the extension of various types of credit, including mortgage and real estate loans, and varied forms of consumer credit, so that the elimination of competition by agreement between Crocker and Crocker Bank and any one or more of the other corporate defendants would constitute a violation of a provision of the antitrust laws.

V

VIOLATIONS ALLEGED

19. The defendant Otto N. Miller has been and is now a director at the same time of the defendants Crocker, Crocker Bank and Equitable in violation of Section 8 of the Clayton Act.

20. The defendants Crocker, Crocker Bank and Equitable have each permitted the defendant Otto N. Miller to be elected and to serve at the same time as a director of both the defendants Crocker, Crocker Bank and the defendant Equitable in violation of Section 8 of the Clayton Act.

21. The defendant Emmett G. Solomon has been and is now a director at the same time of the defendants Crocker, Crocker Bank and Metropolitan, in violation of Section 8 of the Clayton Act.

22. The defendants Crocker, Crocker Bank and Metropolitan have each permitted the defendant Emmett G. Solomon to be elected and to serve at the same time as a director of both the defendants Crocker, Crocker Bank and the defendant Metropolitan, in violation of Section 8 of the Clayton Act.

23. The defendant Thomas R. Wilcox has been and is now a director at the same time of the defendants Crocker, Crocker Bank and MONY, in violation of Section 8 of the Clayton Act.

24. The defendants Crocker, Crocker Bank and MONY have each permitted the defendant Thomas R. Wilcox to be elected and to serve at the same time as director of both the defendants, Crocker, Crocker Bank and the defendant MONY, in violation of Section 8 of the Clayton Act.

25. The defendants will continue to violate Section 8 of the Clayton Act unless the relief prayed for herein is granted.

PRAYER

WHEREFORE, plaintiff prays:

1. That it be adjudged and decreed that the defendants have violated Section 8 of the Clayton Act.

2. That the defendant Otto N. Miller be ordered and directed immediately to resign his directorship either in the defendants Crocker and Crocker Bank or the defendant Equitable, as the Court shall direct, and immediately to withdraw from participation in the direction, control, conduct of the business of the defendant or defendants from which he has been directed to resign.

3. That the defendant Otto N. Miller be perpetually enjoined from becoming a director, or serving as a director in any two or more competing corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in interstate commerce.

4. That the defendant Emmett G. Solomon be ordered and directed immediately to resign his directorship either in the defendants Crocker and Crocker Bank or the defendant Metropolitan, as the Court shall direct, and immediately to withdraw from participation in the direction, control, or conduct of the business of the defendant or defendants from which he has been directed to resign.

5. That the defendant Emmett G. Solomon be perpetually enjoined from becoming a director, or serving as a director in any two or more competing corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in interstate commerce.

6. That the defendant Thomas R. Wilcox be ordered and directed immediately to resign his directorship either in the defendants Crocker and Crocker Bank or the defendant MONY, as the Court shall direct, and immediately to withdraw from participation in the direction, control or conduct of the business of the defendant or defendants from which he has been directed to resign.

7. That the defendant Thomas R. Wilcox be perpetually enjoined from becoming a director, or serving as a director in any two or more competing corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in interstate commerce.

8. That the defendant corporation or corporations from which the defendant Otto N. Miller is directed to resign be compelled to accept his resignation and be enjoined, so long as he continues to be a director of a

competing corporation, from allowing him or anyone acting in his stead, to serve as a director, or to participate in the direction, control or conduct of the business of such corporation or corporations.

9. That the defendant corporation or corporations from which the defendant Emmett G. Solomon is directed to resign be compelled to accept his resignation and be enjoined, so long as he continues to be a director of a competing corporation, from allowing him or anyone acting in his stead, to serve as a director, or to participate in the direction, control or conduct of the business of such corporation or corporations.

10. That the defendant corporation or corporations from which the defendant Thomas R. Wilcox is directed to resign be compelled to accept his resignation and be enjoined, so long as he continues to be a director of a competing corporation, from allowing him, or anyone acting in his stead, to serve as a director, or to participate in the direction, control or conduct of the business of such corporation or corporations.

11. That the defendants Crocker, Crocker Bank, Metropolitan, Equitable, and MONY each be perpetually enjoined from permitting any person who is director of a competing corporation to serve as a director, officer, or employee of said defendant corporation or to participate in the direction, control or conduct of the business of said defendant corporation.

12. That the plaintiff have such other, further and different relief as the case may require and the Court may deem just and proper.

13. That the plaintiff recover its taxable costs.

DATED:

/s/ Thomas E. Kauper
THOMAS E. KAUPER
Assistant Attorney General

/s/ Baddia J. Rashid
BADDIA J. RASHID

/s/ William E. Swope
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POLLY L. FRENKEL

Attorneys,
Department of Justice

2. *Stipulation*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. 75 2108 RFP

Antitrust

UNITED STATES OF AMERICA,
Plaintiff,

v.

CROCKER NATIONAL CORP.; CROCKER NATIONAL BANK; METROPOLITAN LIFE INSURANCE COMPANY; THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES; THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK; OTTO N. MILLER; EMMETT G. SOLOMON; and THOMAS R. WILCOX,
Defendants.

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and among all signatories to this Stipulation, as follows:

1. For purposes of this Stipulation the following terms shall have the meanings indicated:

"Crocker Bank" means defendant Crocker National Bank;

"Crocker" means defendant Crocker National Corp.;

"Metropolitan" means defendant Metropolitan Life Insurance Company;

"Equitable" means defendant The Equitable Life Assurance Society of the United States;

"MONY" means defendant The Mutual Life Insurance Company of New York;

"Miller" means defendant Otto N. Miller;

"Solomon" means defendant Emmett G. Solomon;

"Wilcox" means defendant Thomas R. Wilcox;

"Life Insurance Defendants" means Metropolitan, Equitable and MONY;

"Corporate Defendants" means Crocker, Crocker Bank, Metropolitan, Equitable and MONY;

"Individual Defendants" means Miller, Solomon and Wilcox; and

"This Proceeding" means all proceedings before this Court herein, and all appeals and petitions for review in the Federal judiciary system with respect thereto.

2. All signatories agree that the agreements, admissions and waivers in this Stipulation shall be solely for the purpose of This Proceeding herein and are not intended to and shall have no effect whatsoever in any other matter or proceeding.

3. Certain rights and defenses are expressly waived as follows:

(a) All signatories agree to file cross motions for summary judgment based on this Stipulation and hereby waive all rights under the Federal Rules of Civil Procedure applicable to pre-trial depositions and discovery and to presentation of oral testimony and documentary evidence, provided, however, that such waiver shall not apply to any such pre-trial depositions, discovery, oral testimony and documentary evidence (i) as may be relevant to any material issue of fact on which the Court

sua sponte requests evidence, or (ii) as may be invoked by any party on any and all issues should the Court deny all motions for summary judgment, or should none of the signatories file a motion for summary judgment within sixty days after this Stipulation is filed with the Court.

(b) Each defendant-signatory hereby waives his or its respective right, if any, to a defense based upon mootness.

(c) Except as provided in the second sentence of this subparagraph: (i) each defendant-signatory hereby waives his or its respective right, if any, to a defense based upon the claim that any elimination of competition by agreement between Crocker Bank and any Life Insurance Defendant would not constitute a violation of any of the provisions of any of the antitrust laws; and (ii) each defendant-signatory hereby waives his or its respective right, if any, to a defense based on the claim that the elimination by agreement of competition if any, between Crocker and any Life Insurance Defendant would not constitute a violation of any of the provisions of any of the antitrust laws. The waivers set forth in this subparagraph shall not restrict or impair the right of any defendant to raise any and all legal issues and defenses relating to or based on a contention of the absence of competition between Crocker and any Life Insurance Defendant, or on a contention that Crocker is a bank, banking association or trust company, or on the application of any statutory exemptions to the antitrust laws to the acts and practices challenged in This Proceeding.

(d) The United States hereby waives its right, if any, to claim that Crocker by itself or through its subsidiaries other than Crocker Bank, is a competitor of any of the Life Insurance Defendants so that elimination of competition by agreement between them would constitute a violation of one or more of the provisions of one or more of the antitrust laws. All signatories stipulate and

agree that nothing in this Stipulation shall restrict or impair the right of the United States (i) to claim or contend in any proceeding other than This Proceeding, that Crocker or other bank holding companies compete with any of the Life Insurance Defendants or any other corporation as a result of the activities of Crocker or said bank holding companies independent of the activities of Crocker Bank or any other subsidiary commercial bank, or (ii) to claim or contend in This Proceeding that Crocker is not a bank, banking association, trust company or common carrier subject to the Act to regulate commerce approved February 4, 1887, or that, based solely on the admissions in Paragraph 9 of this Stipulation, Crocker is a competitor of one or more of the Life Insurance Defendants.

(e) Except as to those rights and defenses expressly waived above, nothing in this Stipulation shall restrict or impair the right of any signatory to raise any and all legal issues and defenses that may properly be presented to the Court on a motion for summary judgment based on this Stipulation and to rely upon any relevant statutes, regulations, judicial opinions, official records (including records of legislative history) and similar materials of the type used by Federal courts in resolving legal issues.

4. All signatories agree that:

(a) Each signatory may file a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, which shall be based solely on this Stipulation, on the ground that the moving party is entitled to a judgment as a matter of law as to all of the claim or claims alleged in the Complaint herein. Except as may be ordered by the Court *sua sponte*, no party shall file any affidavits in support of said motion for summary judgment.

(b) As to each such motion for summary judgment as may be filed, there is no genuine issue as to any ma-

terial fact, and each signatory may raise any and all legal grounds (other than those expressly waived in paragraph 3 of this Stipulation) in support of, or in opposition to, the motion for summary judgment of any signatory.

5. All signatories agree that the Complaint herein is filed, and that This Proceeding is instituted against the named defendants under Section 15 of the Clayton Act (15 U.S.C. § 25), and that the Complaint alleges the continuing violation by such defendants of Section 8 of the Clayton Act (15 U.S.C. § 19) and that defendants deny such alleged violation. Each Corporate Defendant either admits that it conducts business and is found within this district or waives objection with respect thereto.

6. Crocker Bank and each of the Life Insurance Defendants admits that it has regularly used interstate communications, including the mails, telephone and telegraph, to conduct business with some customers located throughout the United States; that some customers have regularly used interstate communications, including the mails, telephone and telegraph, to make deposits, to pay loans, to pay premiums, or to apply for and obtain credit made available by it; that some credit advanced by it has been regularly used to finance interstate activities, and that it is engaged in interstate commerce.

7. Crocker admits that it is engaged in interstate commerce.

8. Crocker admits that it is a bank holding company, registered under the Bank Holding Company Act, as amended, 12 U.S.C. §§ 1841-44, and organized and existing under the laws of the State of Delaware, that it maintains its principal place of business in San Francisco, California, that it has capital, surplus, and undivided profits aggregating more than $1,000,000; and that it is not a common carrier subject to the Act to regulate commerce approved February 4, 1887.

9. Crocker and Crocker Bank admit that Crocker controls Crocker Bank by and through Crocker's ownership of the stock of Crocker Bank and Crocker's election of all of the directors of Crocker Bank. The directors of Crocker Bank manage the bank and select the officers who control the operations and activities of Crocker Bank.

10. Crocker by itself does not both accept deposits that the depositor has a legal right to withdraw on demand and engage in the business of making commercial loans. Crocker by itself is not a member of the Federal Reserve System, is not a member of the Federal Deposit Insurance Corporation, and is not organized under the National Bank Act.

11. Crocker Bank admits that it is a banking association organized under the laws of the United States of America, that it is a wholly-owned subsidiary of Crocker (except for directors' qualifying shares), that its principal place of business is in San Francisco, California, and that it has capital, surplus, and undivided profits aggregating more than $1,000,000.

12. Metropolitan admits that it is a corporation organized and existing under the laws of the State of New York, that its principal place of business is in New York, New York, that it has capital, surplus, and undivided profits aggregating more than $1,000,000; and that it is not a bank, banking association, trust company or common carrier subject to the Act to regulate commerce approved February 4, 1887.

13. Equitable admits that it is a corporation organized and existing under the laws of the State of New York, that its principal place of business is in New York, New York, that it has capital, surplus, and undivided profits aggregating more than $1,000,000; and that it is not a bank, banking association, trust company or common carrier subject to the Act to regulate commerce approved February 4, 1887.

14. MONY admits that it is a corporation organized and existing under the laws of the State of New York, that its principal place of business is in New York, New York, that it has capital, surplus, and undivided profits aggregating more than $1,000,000; and that it is not a bank, banking association, trust company or common carrier subject to the Act to regulate commerce approved February 4, 1887.

15. Crocker, Crocker Bank and Equitable each admits that Miller was elected and served, and is continuing to serve, at the same time as a director of Crocker, Crocker Bank and Equitable and that during part of that time each such Corporate Defendant had knowledge of Miller's position as a director of the other two Corporate Defendants and the Corporate Defendants have not taken action to terminate or prevent such simultaneous service.

16. Solomon admits that he has offices in San Francisco, California, and that he has been and is now a director of Crocker, Crocker Bank and Metropolitan.

17. Crocker, Crocker Bank and Metropolitan each admits that Solomon was elected and served, and is continuing to serve, at the same time as a director of Crocker, Crocker Bank and Metropolitan and that during part of that time each such Corporate Defendant had knowledge of Solomon's position as a director of the other two Corporate Defendants and the Corporate Defendants have not taken action to terminate or prevent such simultaneous service.

18. Wilcox admits that he has offices in San Francisco, California, and that he has been and is now a director of Crocker, Crocker Bank and MONY.

19. Crocker, Crocker Bank and MONY each admits that Wilcox was elected and served, and is continuing to serve, at the same time as a director of Crocker, Crocker Bank and MONY and that during part of that time each such Corporate Defendant had knowledge of

Wilcox's position as a director of the other two Corporate Defendants and the Corporate Defendants have not taken action to terminate or prevent such simultaneous service.

20. All signatories stipulate and agree that a supply of credit is a part of the trade and commerce of the United States; that credit is employed in the operations of state or local governments, the expansion of large industries and the establishment of small businesses; that credit in the form of mortgages and real estate loans is used to finance the construction and purchase of commercial and industrial buildings, multiple and single family housing; and that business entities competing in the extension of credit for such purposes include some commercial banks and some life insurance companies.

21. All signatories stipulate and agree that Crocker Bank and the Life Insurance Defendants hold themselves out in various places at various times as lenders who are willing to extend credit secured by an interest in real estate. Each maintains mortgage departments which include employees specializing in certain types of mortgage loans. At times some defendants may deal face to face with the borrower from the inception of the loan, directly negotiating the interest rate, payment terms, and the nature and value of the collateral. Thus, from time to time or place to place, a borrower may be in a position to select from or negotiate with Crocker Bank and one or more of the Life Insurance Defendants, each offering to extend credit secured by an interest in real property. Some lenders retain loans to maturity; others resell loans to third parties. Other companies, often called mortgage bankers or mortgage brokers or mortgage correspondents, also negotiate real estate mortgage loans with borrowers with the intention of reselling such loans to third parties. Some commercial banks, some insurance companies and others purchase these mortgage loans from mortgage bankers and other banks and insurance companies.

22. All signatories stipulate and agree that like some other banks and insurance companies, Crocker Bank and some of the Life Insurance Defendants participate in the origination and holding of real estate mortgage loans on single family dwellings, apartment buildings, office buildings, shopping centers and other farm, commercial and industrial properties. Some of these defendants also may originate and hold various loans on real property insured under various programs of the Federal Housing Administration and the Veterans Administration.

23. All signatories stipulate and agree that each of the Life Insurance Defendants issues policies and develops policy reserves to provide for policy benefits, including "cash values", which increase through the course of the insured's payment of premiums. This cash value at times equals and sometimes exceeds the total of the insured's premium payments. Under the laws of several states life insurance companies are required to lend money to their policyholders against the cash value of their policies, sometimes referred to as "policy loans" or allow the policyholders to withdraw all of such cash values upon cancellation of the policy. Thus, some policyholders purchase life insurance policies, at least in part, to serve a savings function in their financial planning. Crocker Bank, like other commercial banks, maintains savings accounts for its depositors and offers various forms of loans to depositors and consumers in general. These loans may take the form of "passbook" loans (secured by savings deposits), signature loans, overdraft loans and various other consumer loans, secured by real or personal property or the cash value of a life insurance policy.

24. Crocker Bank admits that as of December 31, 1974, it had total deposits of approximately $8.6 billion and total assets of approximately $10 billion; that Crocker Bank's lending services include a range of real estate, commercial and consumer loans and are utilized by customers in many states of the United States; that

Crocker Bank, as of December 31, 1974, had total loans of approximately $6.3 billion, including real estate mortgage loans of more than $1.5 billion and commercial loans exceeding $3.9 billion, and installment credit of approximately $890 million which includes a variety of installment loans to consumers.

25. Metropolitan admits that it is now engaged in the life insurance business, that it is licensed to operate in fifty states of the United States and does a substantial volume of business in the State of California; that as of December 31, 1974, it had total assets in excess of $32 billion, including outstanding mortgage loans of approximately $12 billion, of which approximately $1.6 billion consisted of mortgage loans on real estate located in the State of California.

26. Equitable admits that it is now engaged in the life insurance business, that it is licensed to operate in fifty states of the United States and does a substantial volume of business in the State of California; that as of December 31, 1974, it had total assets in excess of $17.5 billion, including outstanding mortgage loans of approximately $6.8 billion, of which $785 million consisted of mortgage loans on real estate located in the State of California.

27. MONY admits that it is now engaged in the life insurance business, that it is licensed to operate in fifty states of the United States and does a substantial volume of business in the State of California; that as of December 31, 1974, it had total assets in excess of $4.3 billion, including outstanding mortgage loans of approximately $1.2 billion, of which $197 million consisted of mortgage loans on real estate located in the State of California.

28. Both Crocker Bank and some of the Life Insurance Defendants offer Individual Retirement Accounts ("IRA") pursuant to the 1974 Pension Reform Act, allowing individuals to invest savings free from income tax until withdrawal during retirement.

29. All signatories hereby stipulate and agree that Crocker Bank, by vitrue of its business and location of operations, has been and is now a competitor of each of the Life Insurance Defendants in interstate commerce in the extension of mortgage and real estate loans and that such competition is not insubstantial.

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3. *Answer of Crocker National Corporation, Crocker National Bank and Thomas R. Wilcox*

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C 75 2108 RFP

UNITED STATES OF AMERICA,
Plaintiff,

v.

CROCKER NATIONAL CORP.; CROCKER NATIONAL BANK; METROPOLITAN LIFE INSURANCE COMPANY; THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES; THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK; OTTO N. MILLER; EMMETT G. SOLOMON; and THOMAS R. WILCOX,
Defendants.

ANSWER OF
CROCKER NATIONAL CORPORATION,
CROCKER NATIONAL BANK
AND THOMAS R. WILCOX

CROCKER NATIONAL CORPORATION, CROCKER NATIONAL BANK and THOMAS R. WILCOX (here-

after collectively referred to as "defendants"), answer the Complaint filed in the above-entitled action as follows:

1. Except as expressly admitted in the Stipulation between the parties filed in the above action on March 15, 1976, defendants deny each and every allegation contained in the Complaint.

WHEREFORE, defendants pray for judgment in their favor dismissing the Complaint together with their costs of suit and such other relief as the Court deems proper.

Dated: March 26, 1976

ROBERT D. RAVEN
MELVIN R. GOLDMAN
MORRISON & FOERSTER

By /s/ Robert D. Raven
ROBERT D. RAVEN

Attorneys for
Crocker National Corp.,
for Crocker National Bank
and for Thomas R. Wilcox

4. *Answer of The Mutual Life Insurance Company of New York*

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Attorneys for Defendant
The Mutual Life Insurance
Company of New York

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C 75 2108 RFP

Antitrust

UNITED STATES OF AMERICA,
Plaintiff,
v.

CROCKER NATIONAL CORP.; CROCKER NATIONAL BANK; METROPOLITAN LIFE INSURANCE COMPANY; THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES; THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK; OTTO N. MILLER; EMMETT G. SOLOMON; and THOMAS R. WILCOX,
Defendants.

ANSWER OF THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK answers the complaint filed in the above entitled action as follows:

1. Except as expressly admitted in the Stipulation between the parties filed in the above action on March 15, 1976, defendant The Mutual Life Insurance Company of New York denies each and every averment contained in the complaint.

WHEREFORE, this defendant prays for judgment in its favor dismissing the complaint, together with this defendant's costs of suit and such other relief as the Court deems proper.

Dated: March 26, 1976.

J. RANDOLPH WILSON
COVINGTON & BURLING

ROBERT D. RAVEN
MORRISON & FOERSTER

By /s/ Robert D. Raven
ROBERT D. RAVEN

Attorneys for
The Mutual Life Insurance
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5. *Answer of The Equitable Life Assurance Society of the United States*

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Attorneys for Defendant
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C 75 2108 RFP

Antitrust

UNITED STATES OF AMERICA,
Plaintiff,

v.

CROCKER NATIONAL CORP.; CROCKER NATIONAL BANK; METROPOLITAN LIFE INSURANCE COMPANY; THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES; THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK; OTTO N. MILLER; EMMETT G. SOLOMON; and THOMAS R. WILCOX,
Defendants.

ANSWER OF
THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES answers the complaint filed in the above entitled action as follows:

1. Except as expressly admitted in the Stipulation between the parties filed in the above action on March 15, 1976, defendant The Equitable Life Assurance Society of The United States denies each and every averment contained in the complaint.

WHEREFORE, defendant prays for judgment in its favor dismissing the complaint, together with this defendant's costs of suit and such other relief as the Court deems proper.

Dated: March 26, 1976.

J. RANDOLPH WILSON
COVINGTON & BURLING

ROBERT D. RAVEN
MORRISON & FOERSTER

By /s/ Robert D. Raven
ROBERT D. RAVEN

Attorneys for
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6. *Answer of Metropolitan Life Insurance Company*

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C 75 2108 RFP

UNITED STATES OF AMERICA,
Plaintiff,

v.

CROCKER NATIONAL CORP.; CROCKER NATIONAL BANK; METROPOLITAN LIFE INSURANCE COMPANY; THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES; THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK; OTTO N. MILLER; EMMETT G. SOLOMON; and THOMAS R. WILCOX,

Defendants.

ANSWER OF
METROPOLITAN LIFE INSURANCE COMPANY

Metropolitan Life Insurance Company (hereinafter referred to as "Metropolitan"), by its undersigned attorneys, hereby answers the complaint herein as follows:

1. As to the allegations of paragraph 1 of the complaint: Denies each and every alleged violation by Metropolitan of Section 8 of the Clayton Act (15 U.S.C. § 19).

Admits that it conducts business and is found within this district. States that it lacks knowledge or information sufficient to form a belief as to the truth of all other allegations contained therein which relate to Metropolitan except to the extent that such allegations may be agreed to in paragraph 5 of a Stipulation of the parties herein (except defendant Otto N. Miller) filed with the Court on March 15, 1976 (hereinafter referred to as "Stipulation"), to which extent such allegations are admitted herein on information and belief as to Metropolitan. As to all other allegations contained therein, which allegations do not relate to Metropolitan, respectfully refers the Court to paragraph 5 of the Stipulation, and states that it lacks knowledge or information sufficient to form a belief as to the truth of any such allegations not admitted or denied therein. A copy of the Stipulation is annexed hereto as an Exhibit.

2. As to the allegations of paragraph 2 of the complaint: Denies that defendant Crocker National Corp. (hereinafter referred to as "Crocker") is not a bank, banking association or trust company within the meaning of Section 8 of the Clayton Act (15 U.S.C. § 19) in respect of the violations of law alleged in the complaint against Metropolitan, and, as to all other allegations contained therein, which allegations do not relate to Metropolitan, respectfully refers the Court to paragraph 8 of the Stipulation, and states that it lacks knowledge or information sufficient to form a belief as to the truth of any such allegations not admitted or denied therein.

3. As to the allegations of paragraph 3 of the complaint: States, on information and belief, that Crocker National Bank (hereinafter referred to as "Crocker Bank") is a banking association organized under the laws of the United States of America, and that it is a wholly-owned subsidiary of Crocker (except for directors' qualifying shares), and, as to all other allegations contained therein, which allegations do not relate to Metropolitan, respectfully refers the Court to para-

graph 11 of the Stipulation, and states that it lacks knowledge or information sufficient to form a belief as to the truth of any such allegations not admitted or denied therein.

4. As to the allegations of paragraph 4 of the complaint: Admits that it is a corporation organized and existing under the laws of the State of New York, that it maintains its principal place of business in New York, New York, that it has capital, surplus, and undivided profits aggregating more than $1,000,000, and that it is not a bank, banking association, trust company or common carrier subject to the Act to regulate commerce approved February 4, 1887.

5. As to the allegations of paragraph 5 of the complaint, which allegations do not relate to Metropolitan: Respectfully refers the Court to paragraph 13 of the Stipulation, and states that it lacks knowledge or information sufficient to form a belief as to the truth of any such allegations not admitted or denied therein.

6. As to the allegations of paragraph 6 of the complaint, which allegations do not relate to Metropolitan: Respectfully refers the Court to paragraph 14 of the Stipulation, and states that it lacks knowledge or information sufficient to form a belief as to the truth of any such allegations not admitted or denied therein.

7. As to the allegations of paragraph 7 of the complaint, which allegations do not relate to Metropolitan: States that it lacks knowledge or information sufficient to form a belief as to the truth of such allegations.

8. As to the allegations of paragraph 8 of the complaint: States, on information and belief, that Emmett G. Solomon maintains offices in San Francisco, California, and admits that Mr. Solomon has been and is now a director of Crocker, Crocker Bank, and Metropolitan.

9. As to the allegations of paragraph 9 of the complaint, which allegations do not relate to Metropolitan:

Respectfully refers the Court to paragraph 18 of the Stipulation, and states that it lacks knowledge or information sufficient to form a belief as to the truth of any such allegations not admitted or denied therein.

10. As to the allegations of paragraph 11 of the complaint: States that it lacks knowledge or information sufficient to form a belief as to the truth of such allegations except to the extent that such allegations may be stipulated and agreed to in paragraph 20 of the Stipulation, to which extent such allegations are admitted herein on information and belief.

11. As to the allegations of paragraph 12 of the complaint: Denies such allegations except to the extent that such allegations may be stipulated and agreed to in paragraph 23 of the Stipulation, to which extent they are admitted herein on information and belief.

12. As to the allegations of paragraph 13 of the complaint, which allegations do not relate to Metropolitan: Respectfully refers the Court to paragraph 24 of the Stipulation, and states that it lacks knowledge or information sufficient to form a belief as to the truth of any such allegations not admitted or denied therein.

13. As to the allegations of paragraph 14 of the complaint: Admits that it is now engaged in the life insurance business, that it is licensed to operate in fifty states of the United States and does a substantial volume of business in the State of California, and that as of December 31, 1974, it had total assets in excess of $32 billion, including outstanding mortgage loans of approximately $12 billion of which approximately $1.6 billion consisted of mortgage loans on real estate located in the State of California.

14. As to the allegations of paragraph 15 of the complaint, which allegations do not relate to Metropolitan: Respectfully refers the Court to paragraph 26 of the

Stipulation, and states that it lacks knowledge or information sufficient to form a belief as to any such allegations not admitted or denied therein.

15. As to the allegations of paragraph 16 of the complaint, which allegations do not relate to Metropolitan: Respectfully refers the Court to paragraph 27 of the Stipulation, and states that it lacks knowledge or information sufficient to form a belief as to any such allegations not admitted or denied therein.

16. As to the allegations of paragraph 17 of the complaint: Denies all such allegations which relate to Metropolitan except to the extent that such allegations may be admitted in paragraph 6 of the Stipulation, to which extent they are admitted herein as to Metropolitan; and, as to all other allegations contained therein, which allegations do not relate to Metropolitan, respectfully refers the Court to paragraph 6 of the Stipulation, and states that it lacks knowledge or information sufficient to form a belief as to the truth of any such allegations not admitted or denied therein.

17. As to the allegations of paragraph 18 of the complaint: Denies all such allegations which relate to Metropolitan except to the extent that such allegations may be stipulated and agreed to in paragraph 29 of the Stipulation, to which extent they are admitted herein on information and belief as to Metropolitan; and, as to all other allegations contained therein, which allegations do not relate to Metropolitan, respectfully refers the Court to paragraph 29 of the Stipulation, and states that it lacks knowledge or information sufficient to form a belief as to the truth of any such allegations not admitted or denied therein.

18. Denies, on information and belief, the allegations of law violations contained in paragraph 19 of the complaint.

19. Denies, on information and belief, the allegations of law violations contained in paragraph 20 of the complaint.

20. Denies the allegations of law violations contained in paragraph 21 of the complaint.

21. Denies the allegations of law violations contained in paragraph 22 of the complaint.

22. Denies, on information and belief, the allegations of law violations contained in paragraph 23 of the complaint.

23. Denies, on information and belief, the allegations of law violations contained in paragraph 24 of the complaint.

24. Denies the allegations of paragraph 25 of the complaint as to Metropolitan, and, on information and belief, as to all other defendants.

WHEREFORE, Metropolitan prays that the Court grant judgment dismissing the complaint and awarding it the costs of this action.

DATED: March 26, 1976

WEIL, GOTSHAL & MANGES

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7. *Answer of Emmett G. Solomon*

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C 75 2108 RFP

UNITED STATES OF AMERICA,
Plaintiff,

v.

CROCKER NATIONAL CORP.; CROCKER NATIONAL BANK; METROPOLITAN LIFE INSURANCE COMPANY; THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES; THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK; OTTO N. MILLER; EMMETT G. SOLOMON; and THOMAS R. WILCOX,
Defendants.

ANSWER OF
EMMETT G. SOLOMON

EMMETT G. SOLOMON answers the Complaint filed in the above-entitled action as follows:

1. Except as expressly admitted in the Stipulation between the parties filed in the above action on March 15,

1976, defendant Solomon denies each and every allegation contained in the Complaint.

WHEREFORE, defendant prays for judgment in his favor dismissing the Complaint together with his costs of suit and such other relief as the Court deems proper.

Dated: March 26, 1976.

RICHARD E. GUGGENHIME
CHRISTOPHER L. KAUFMAN
HELLER, EHRMAN, WHITE & MCAULIFFE

By /s/ Christopher L. Kaufman
CHRISTOPHER L. KAUFMAN
Attorneys for Emmett G. Solomon

B. U.S. v. BankAmerica Corp., et al.

1. *Complaint*

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C 75 2109 RFP

Antitrust

UNITED STATES OF AMERICA,
Plaintiff,

v.

BANKAMERICA CORPORATION; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; BANKERS TRUST NEW YORK CORPORATION; BANKERS TRUST COMPANY; THE PRUDENTIAL INSURANCE COMPANY OF AMERICA; E. HORNSBY WASSON; PAUL A. GORMAN,
Defendants.

Filed: October 6, 1975

COMPLAINT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the defendants and complains and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted against the defendants under Section 15 of the Act of Congress of October 15, 1914, as amended (15 U.S.C. § 25), commonly known as the Clayton Act in order to prevent and restrain the continuing violation by the defendants, as hereinafter alleged, of Section 8 of the Clayton Act (15 U.S.C. § 19). BankAmerica Corporation; Bank of America National Trust & Savings Association; Bankers Trust New York Corporation; Bankers Trust Company; and the Prudential Insurance Company of America conduct business and are found within this district.

II

THE DEFENDANTS

2. BankAmerica Corporation (hereinafter referred to as "BankAmerica") is made a defendant herein. BankAmerica is a bank holding company organized and existing under the laws of the State of Delaware and maintains its principal place of business in San Francisco, California. BankAmerica has capital, surplus, and undivided profits aggregating more than $1,000,000 and is not a bank, banking association, trust company or common carrier subject to the Act to regulate commerce approved February 4, 1887.

3. Bank of America National Trust and Savings Association (hereinafter referred to as "Bank of America") is made a defendant herein. Bank of America is a banking association organized under the laws of the United States of America, and is a wholly owned subsidiary of BankAmerica. Bank of America maintains its principal place of business in San Francisco, California and has capital, surplus, and undivided profits aggregating more than $1,000,000.

4. Bankers Trust New York Corporation (hereinafter referred to as "Bankers") is made a defendant herein. Bankers is a bank holding company organized and existing under the laws of the State of New York and maintains its principal place of business in New York, New York. Bankers has capital, surplus, and undivided profits aggregating more than $1,000,000 and is not a bank, banking association, trust company or common carrier subject to the Act to regulate commerce approved February 4, 1887.

5. Bankers Trust Company (hereinafter referred to as "Bankers Trust") is made a defendant herein. Bankers Trust is a banking association organized under the laws of the United States of America, and is a wholly owned subsidiary of Bankers. Bankers Trust maintains its principal place of business in New York, New York and has capital, surplus, and undivided profits aggregating more than $1,000,000.

6. The Prudential Insurance Company of America (hereinafter referred to as "Prudential") is made a defendant herein. Prudential is a corporation organized and existing under the laws of the State of New Jersey and maintains its principal place of business in Newark, New Jersey. Prudential has capital, surplus, and undivided profits aggregating more than $1,000,000 and is not a bank, banking association, trust company or common carrier subject to the Act to regulate commerce approved February 4, 1887.

7. E. Hornsby Wasson is made a defendant herein. Mr. Wasson maintains offices at Bank of America Center, San Francisco, California. During the period February 21, 1967 to June 5, 1975, Mr. Wasson served at the same time as a director of defendants BankAmerica, Bank of America and Prudential. On May 28, 1975, plaintiff, through its counsel, notified Mr. Wasson that it intended to file this complaint. On June 5, 1975, Mr. Wasson re-

signed as a director of BankAmerica and Bank of America.

8. Paul A. Gorman is made a defendant herein. Mr. Gorman maintains offices at Prudential Plaza, Newark, New Jersey. Mr. Gorman has been and is now a director of defendants Bankers, Bankers Trust, and Prudential.

III

DEFINITION

9. The "corporate defendants" herein are BankAmerica, Bank of America, Bankers, Bankers Trust and Prudential. Each reference herein to any one of the corporate defendants includes all subsidiaries and divisions of said corporate defendant which are not named as defendants.

IV

TRADE AND COMMERCE

10. A supply of credit is a necessaary part of the trade and commerce of the United States. It is essential to the operations of state and local governments, the expansion of large industries and the establishment of small business. Credit in the form of mortgages and real estate loans finances the construction and purchase of commercial and industrial buildings, multiple and single family housing. Business entities that compete in the extension of credit for these purposes include commercial banks and insurance companies.

11. Life insurance companies also extend loans to policy-holders which are secured by the cash value of the life insurance policy. Such loans, known as "policy loans," compete directly with the varied loans offered by commercial banks to consumers.

12. As of December 31, 1974, Bank of America had total deposits of $50.7 billion and total resources of $60.4

billion. The bank's lending services include the entire range of real estate, commercial and consumer loans, and are utilized by customers throughout the nation and around the world. As of December 31, 1974, it had total loans in excess of $30 billion, including commercial loans exceeding $10 billion. On the same date, the bank's installment credit totaled approximately $4.4 billion, which included a variety of installment loans to consumers under the widely known trademark "Timeplan." In 1974, Bank of America was the nation's largest real estate lender holding over $5 billion in real estate mortgage loans.

13. As of December 31, 1974, Bankers and its subsidiaries had total deposits of $16.9 billion and total resources of $20.4 billion. On the same date, Bankers' total loans exceeded $12.3 billion. Of this amount, approximately $3.5 billion consisted of commercial and industrial loans, over $700 million consisted of installment credit, and approximately $1.2 billion consisted of real estate loans. Bankers provides lending services which include the entire range of real estate, commercial and consumer loans, and are utilized by customers throughout the nation and around the world. In 1974, Bankers Trust accounted for approximately 94 percent of the assets and revenues of Bankers.

14. Defendant Prudential has been and is now engaged in the life insurance business. It is the largest insurance company in the United States and does a substantial volume of business in the State of California. As of December 31, 1974, it had total assets in excess of $35 billion, including outstanding mortgage loans of more than $12 billion. Of this amount, $1.6 billion consisted of mortgage loans on real estate located in the State of California.

15. Each of the corporate defendants has regularly used interstate communication, including the mails, telephone and telegraph, to conduct business with customers located throughout the United States. Customers located

throughout the United States have regularly used interstate communication, including the mails, telephone and telegraph, to make deposits, to pay loans, to pay premiums or accounts, to apply for and obtain credit, and obtain various goods and services made available by each of said corporate defendants. Credit advanced by the corporate defendants has been used regularly to finance interstate transactions. The corporate defendants are all engaged in interstate commerce.

16. By virtue of their businesses and locations of operations, the defendants BankAmerica and Bank of America have been and are now in competition with defendant Prudential in the extension of various types of credit, including mortgage and real estate loans, installment purchase plans, and other forms of consumer credit, so that the elimination of competition by agreement between BankAmerica and/or Bank of America and Prudential would constitute a violation of the antitrust laws.

17. By virtue of their businesses and locations of operations, the defendants Bankers and Bankers Trust have been and are now in competition with defendant Prudential in the extension of various types of credit, including mortgage and real estate loans, installment purchase plans, and other forms of consumer credit, so that the elimination of competition by agreement between Bankers and/or Bankers Trust and Prudential would constitute a violation of the antitrust laws.

V

VIOLATIONS ALLEGED

18. The defendant E. Hornsby Wasson served at the same time as a director of the defendants BankAmerica, Bank of America and Prudential in violation of Section 8 of the Clayton Act from February 21, 1967 to June 5, 1975, at which time he resigned as a director of BankAmerica and Bank of America in anticipation of the filing of this complaint.

19. The defendants BankAmerica, Bank of America and Prudential have each permitted the defendant E. Hornsby Wasson to be elected and to serve at the same time as a director of both the defendants BankAmerica, Bank of America and the defendant Prudential, in violation of Section 8 of the Clayton Act.

20. Paul A. Gorman has been and is now a director at the same time of defendants Bankers, Bankers Trust, and Prudential, in violation of Section 8 of the Clayton Act.

21. The defendants Bankers, Bankers Trust, and Prudential have each permitted the defendant Paul A. Gorman to be elected and to serve at the same time as director of both the defendants Bankers, Bankers Trust, and the defendant Prudential in violation of Section 8 of the Clayton Act.

22. The defendants will continue to violate Section 8 of the Clayton Act unless the relief prayed for herein is granted.

PRAYER

WHEREFORE, plaintiff prays:

1. That it be adjudged and decreed that the defendants have violated Section 8 of the Clayton Act.

2. That the defendant E. Hornsby Wasson be perpetually enjoined from becoming a director, or serving as a director in any two or more competing corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in interstate commerce.

3. That the defendant Paul A. Gorman be ordered and directed immediately to resign his directorship in either the defendants Bankers and Bankers Trust, or the defendant Prudential, as the Court shall direct, and immediately to withdraw from participation in the direction,

control, or conduct of the business of the defendant from which he has been directed to resign.

4. That the defendant Paul A. Gorman be perpetually enjoined from becoming a director, or serving as a director in any two or more competing corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in interstate commerce.

5. That the defendant BankAmerica and Bank of America be enjoined, so long as E. Hornsby Wasson continues to be a director of a competing corporation, from allowing him, or anyone acting in his stead, to serve as a director, or to participate in the direction, control or conduct of the business of such corporation or corporations.

6. That the defendant corporation or corporations from which the defendant Paul A. Gorman is directed to resign be compelled to accept his resignation and be enjoined, so long as he continues to be a director of a competing corporation, from allowing him, or anyone acting in his stead, to serve as a director, or to participate in the direction, control, or conduct of the business of such corporation.

7. That the defendants BankAmerica, Bank of America, Bankers, Bankers Trust, and Prudential each be perpetually enjoined from permitting any person who is a director of a competing corporation to serve as a director, officer, or employee of said defendant corporation or to participate in the direction, control or conduct of the business of said defendant corporation.

8. That the plaintiff have such other, further and different relief as the case may require and the Court may deem just and proper.

9. That the plaintiff recover its taxable costs.

DATED:

/s/ Thomas E. Kauper
THOMAS E. KAUPER
Assistant Attorney General

/s/ Baddia J. Rashid
BADDIA J. RASHID

/s/ William E. Swope
WILLIAM E. SWOPE

/s/ Dwight B. Moore
DWIGHT B. MOORE

Attorneys,
Department of Justice

/s/ Crossan R. Andersen
CROSSAN R. ANDERSEN

/s/ Polly L. Frenkel
POLLY L. FRENKEL

Attorneys,
Department of Justice

2. *Stipulation*

[Names and addresses of counsel appear on signature page.]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C 75 2109 RFP

Antitrust

UNITED STATES OF AMERICA,
Plaintiff,
v.

BANKAMERICA CORPORATION; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; BANKERS TRUST NEW YORK CORPORATION; BANKERS TRUST COMPANY; THE PRUDENTIAL INSURANCE COMPANY OF AMERICA; E. HORNSBY WASSON; and PAUL A. GORMAN,
Defendants.

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and among all signatories to this Stipulation, as follows:

1. For purposes of this Stipulation, the following terms shall have the meanings indicated:

"Bank of America" means defendant Bank of America National Trust & Savings Association;

"BankAmerica" means defendant BankAmerica Corporation;

"Bankers Trust" means defendant Bankers Trust Company;

"Bankers" means defendant Bankers Trust New York Corporation;

"Prudential" means defendant The Prudential Insurance Company of America;

"Wasson" means defendant E. Hornsby Wasson;

"Gorman" means defendant Paul A. Gorman;

"Corporate Defendants" means BankAmerica, Bank of America, Bankers, Bankers Trust and Prudential;

"Individual Defendants" means Wasson and Gorman; and

"This Proceeding" means all proceedings before this Court herein, and all appeals and petitions for review in the Federal judiciary system with respect thereto.

2. All signatories agree that the agreements, admissions and waivers in this Stipulation shall be solely for the purpose of This Proceeding herein and are not intended to and shall have no effect whatsoever in any other matter or proceeding. Neither BankAmerica, nor Bank of America, nor Wasson hereby waive any rights or privileges asserted in their respective motions filed February 23, 1976.

3. Certain rights and defenses are expressly waived as follows:

(a) All signatories agree to file cross motions for summary judgment (except Wasson who shall have that option) based on this Stipulation and hereby waive all rights under the Federal Rules of Civil Procedure applicable to pre-trial depositions and discovery and to presentation of oral testimony and documentary evidence, provided, however, that such waiver shall not apply to any such pre-trial depositions, discovery, oral testimony and documentary evidence (i) as may be relevant to any material issue of fact on which the Court *sua sponte* requests evidence, or (ii) as may be invoked by any party

on any and all issues should the Court deny all motions for summary judgment, or should none of the signatories file a motion for summary judgment within sixty days after this Stipulation is filed with the Court; except that Prudential, and Bank of America, BankAmerica and Wasson agree that plaintiff may undertake such discovery as is provided for in a separate stipulation between plaintiff and Prudential, BankAmerica, Bank of America and Wasson bearing the same date as this Stipulation.

(b) Defendant-signatories, Bankers Trust, Bankers, Prudential and Gorman, hereby waive their respective rights, if any, to a defense based upon mootness.

(c) Except as provided in the second sentence of this subparagraph: (i) each defendant signatory hereby waives his or its respective right, if any, to a defense based upon the claim that the elimination of competition by agreement between Bank of America or Bankers Trust and Prudential would not constitute a violation of any of the provisions of any of the antitrust laws; and (ii) each defendant signatory hereby waives his or its respective right, if any, to a defense based on the claim that the elimination by agreement of competition, if any, between BankAmerica or Bankers and Prudential would not constitute a violation of any of the provisions of any of the antitrust laws. The waivers set forth in this subparagraph shall not restrict or impair the right of any defendant to raise any and all legal issues and defenses relating to or based on a contention of the absence of competition between BankAmerica, or Bankers and Prudential, or a contention that BankAmerica or Bankers is a bank, banking association or trust company or on the application of any statutory exemptions to the antitrust laws of the acts and practices challenged in This Proceeding.

(d) The United States hereby waives its right, if any, to claim that BankAmerica by itself or through its subsidiaries, other than Bank of America, or Bankers by itself or through its subsidiaries, other than Bankers Trust, are competitors of Prudential so that elimination of competition by agreement between them would constitute a violation of one or more of the provisions of one or more of the antitrust laws. All signatories stipulate and agree that nothing in this Stipulation shall restrict or impair the right of the United States (i) to claim or contend in any proceeding other than This Proceeding that BankAmerica or other bank holding companies compete with Prudential or any other corporation as a result of the activities of BankAmerica or said bank holding companies independent of the activities of Bank of America or any other subsidiary commercial bank; or that Bankers or other bank holding companies compete with Prudential or any other corporation as a result of the activities of Bankers or said bank holding companies independent of the activities of Bankers Trust or any other subsidiary commercial bank; or (ii) to claim or contend in This Proceeding that BankAmerica or Bankers is not a bank, banking association, trust company, or common carrier subject to the Act to regulate interstate commerce approved February 4, 1887, and that, based solely on the admissions in Paragraphs 9 and 13 of this Stipulation, BankAmerica or Bankers is a competitor of Prudential.

(e) Except as to those rights and defenses expressly waived above, nothing in this Stipulation shall restrict or impair the right of any signatory to raise any and all legal issues and defenses that may properly be presented to the Court on a motion for summary judgment based on this Stipulation and the answers to the Complaint and to rely upon any

relevant statutes; regulations, judicial opinions, official records (including records of legislative history) and similar materials of the type used by Federal courts in resolving legal issues.

(4) All signatories agree that:

(a) Each signatory may file a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, which shall be based solely on this Stipulation and the answers to the Complaint, on the ground that the moving party is entitled to a judgment as a matter of law as to all of the claim or claims alleged in the Complaint herein. Except as may be ordered by the Court *sua sponte*, no party shall file any affidavits in support of said motion for summary judgment.

(b) As to each such motion for summary judgment as may be filed, there is no genuine issue as to any material fact, and each signatory may raise any and all legal grounds (other than those expressly waived in Paragraph 3 of this Stipulation) in support of, or in opposition to, the motion for summary judgment of any signatory.

5. All signatories agree that the Complaint herein is filed and that This Proceeding is instituted against the named defendants under Section 15 of the Clayton Act (15 U.S.C., § 25) and that the Complaint alleges the continuing violation by such defendants of Section 8 of the Clayton Act (15 U.S.C. § 19) and that defendants deny such alleged violation. Each Defendant either admits that it conducts business and is found within this District or waives objection with respect thereto.

6. Bankers Trust, Prudential and Bank of America each admits that it has regularly used interstate communications, including the mails, telephone and telegraph, to conduct business with some customers located throughout the United States; that some customers have

regularly used interstate communications, including the mails, telephone and telegraph, to make deposits, to pay loans, to pay premiums, or to apply for and obtain credit made available by it; that some credit advanced by it has been regularly used to finance interstate activities, and that it is engaged in interstate commerce.

7. Bankers, and BankAmerica each admits that it is engaged in interstate commerce.

8. BankAmerica admits that it is a bank holding company registered under the Bank Holding Company Act, as amended, 12 U.S.C. §§ 1841 et. seq., and organized and existing under the laws of the State of Delaware, that it maintains its principal place of business in San Francisco, California, that it has capital, surplus, and undivided profits aggregating more than $1,000,000; and that it is not a common carrier subject to the Act to regulate commerce approved February 4, 1887.

9. BankAmerica and Bank of America admit that BankAmerica controls Bank of America by and through BankAmerica's ownership of the stock of Bank of America and BankAmerica's election of all the directors of Bank of America. The directors of Bank of America manage the bank and select the officers who control the operations and activities of Bank of America.

10. BankAmerica by itself does not both accept deposits that the depositor has a legal right to withdraw on demand and engage in the business of making commercial loans. BankAmerica by itself is not a member of the Federal Reserve System, is not a member of the Federal Deposit Insurance Corporation, and is not organized under the National Bank Act.

11. Bank of America admits that it is a banking association organized under the laws of the United States of America, that it is a wholly-owned subsidiary of BankAmerica (except for directors' qualifying shares), that its principal place of business is in San Francisco, Cali-

fornia, and that it has capital, surplus, and undivided profits aggregating more than $1,000,000.

12. Bankers admits that it is a bank holding company registered under the Bank Holding Company Act, as amended, 12 U.S.C. §§ 1841 et. seq., and organized and existing under the laws of the State of New York, that it maintains its principal place of business in New York, New York, that it has capital, surplus, and undivided profits aggregating more than $1,000,000; and that it is not a common carrier subject to the Act to regulate commerce approved February 4, 1887.

13. Bankers and Bankers Trust admit that Bankers controls Bankers Trust by and through Bankers' ownership of the stock of Bankers Trust and Bankers' election of all of the directors of Bankers Trust. The directors of Bankers Trust manage the bank and select the officers who control the operations and activities of Bankers Trust.

14. Bankers by itself does not both accept deposits that the depositor has a legal right to withdraw on demand and engage in the business of making commercial loans. Bankers by itself is not a member of the Federal Reserve System, is not a member of the Federal Deposit Insurance Corporation, and is not organized under the National Bank Act.

15. Bankers Trust admits that it is a bank and trust company organized under the laws of the State of New York, that it is a wholly-owned subsidiary of Bankers, that its principal place of business is in New York, New York, that it has capital, surplus, and undivided profits aggregating more than $1,000,000; and that it is a member of The Federal Reserve System.

16. Prudential admits that it is a corporation organized and existing under the laws of the State of New Jersey, that its principal place of business is in Newark, New Jersey, that it has capital, surplus, and

undivided profits aggregating more than $1,000,000; and that it is not a bank, banking association, trust company or common carrier subject to the Act to regulate commerce approved February 4, 1887.

17. Wasson admits that he has offices in San Francisco, California, and was a director of Bank of America and Prudential during the period February 21, 1967, to June 5, 1975; he was a director of BankAmerica and Prudential during the period March 18, 1969, to June 5, 1975; on or about May 27, 1975, Wasson received actual notice that the United States intended to name him as a defendant in This Proceeding; and Wasson resigned on June 5, 1975, as a director of BankAmerica and Bank of America.

18. BankAmerica, Bank of America and Prudential each admits that Wasson was elected and served at the same time as a director of BankAmerica, Bank of America and Prudential and that during part of that time each such Corporate Defendant had knowledge of Wasson's position as a director of the other two Corporate Defendants and the Corporate Defendants had not taken action to terminate or prevent simultaneous service.

19. Gorman admits that he maintains office facilities in Summit, New Jersey, and that he has been and is now a director of Bankers, Bankers Trust and Prudential.

20. Bankers, Bankers Trust and Prudential each admits that Gorman was elected and served, and is continuing to serve, at the same time as a director of Bankers, Bankers Trust and Prudential and that during part of that time each such Corporate Defendant had knowledge of Gorman's position as a director of the other two Corporate Defendants, and the Corporate Defendants have not taken action to terminate or prevent such simultaneous service.

21. All signatories stipulate and agree that a supply of credit is a part of the trade and commerce of the United States; that credit is employed in the operations of state and local governments, the expansion of large industries and the establishment of small businesses; that credit in the form of mortgages and real estate loans is used to finance the construction and purchase of commercial and industrial buildings, multiple and single family housing; and that business entities competing in the extension of credit for such purposes include some commercial banks and some life insurance companies.

22. All signatories stipulate and agree that Bank of America and Bankers Trust and Prudential hold themselves out in various places at various times as lenders who are willing to extend credit secured by an interest in real estate. Each maintains mortgage departments which include employees specializing in certain types of mortgage loans. At times each company deals face to face with the borrower from the inception of the loan, directly negotiating the interest rate, payment terms, and the nature and value of the collateral. Thus, from time to time or place to place, a borrower may be in a position to select from or negotiate with Bank of America, Bankers Trust and Prudential, each offering to extend credit secured by an interest in real property. Some lenders retain loans to maturity; others resell loans to third parties. Other companies, often called mortgage bankers or mortgage brokers or mortgage correspondents, also negotiate real estate mortgage loans with borrowers with the intention of reselling such loans to third parties. Some commercial banks, some insurance companies and others purchase these mortgage loans from mortgage bankers and other banks and insurance companies.

23. All signatories stipulate and agree that like some other banks and insurance companies, Bank of America, Bankers Trust and Prudential each participates in the

origination and holding of real estate mortgage loans on single family dwellings, or apartment buildings, or office buildings, or shopping centers or other farm, commercial or industrial properties. Some of these defendants also may originate and hold various loans on real property insured under various programs of the Federal Housing Administration and the Veterans Administration.

24. All signatories stipulate and agree that Prudential issues life insurance policies and develops policy reserves to provide for policy benefits including "cash value," which increase through the course of the insured's payment of premiums. This cash value at times equals and sometimes exceeds the total of the insured's premium payments. Under the laws of several states life insurance companies are required to lend money to their policyholders against the cash value of their policies, sometimes referred to as "policy loans" or allow the policyholders to withdraw all of such cash value upon cancellation of the policy. Thus, some policyholders purchase life insurance policies, at least in part, to serve a savings function in their financial planning. Bank of America and Bankers Trust, like other commercial banks, each maintains savings accounts for its depositors and offers various forms of loans to depositors and consumers in general. These loans may take the form of "passbook" loans (secured by savings deposits), signature loans, overdraft loans and various other consumer loans, some of which are secured by real or personal property or the cash value of a life insurance policy.

25. Bank of America admits that as of December 31, 1974, it had total deposits of approximately $51.1 billion and total assets of approximately $59.3 billion; that its lending services include a range of real estate, commercial and consumer loans and are utilized by customers in many states of the United States; that Bank of America, as of December 31, 1974, had total loans of

approximately $30 billion, including commercial loans exceeding $10 billion, and installment credit of approximately $4.4 billion which includes a variety of installment loans to consumers; according to its information and belief, that, in 1974 Bank of America was one of the nation's largest real estate lenders, holding over $5 billion in real estate mortgage loans.

26. Bankers Trust admits that as of December 31, 1974, it had total deposits of approximately $16.1 billion and total assets of approximately $19.2 billion; that its lending services include a range of real estate, commercial and consumer loans and are utilized by customers in many states of the United States; that Bankers Trust, as of December 31, 1974, had total loans of approximately $11.5 billion, including real estate mortgage loans, commercial loans, and installment credit which includes a variety of installment loans to customers.

27. Prudential admits that it is now engaged in the life insurance business, that it is licensed to operate in fifty states of the United States and does a substantial volume of business in the State of California; that as of December 31, 1974, it had total assets in excess of $35 billion, including outstanding mortgage loans of approximately $12 billion, of which $1.6 billion consisted of mortgage loans on real estate located in the State of California.

28. Bank of America and Prudential offer Individual Retirement Account ("IRA") plans pursuant to the 1974 Pension Reform Act; Bankers Trust does not offer such IRA plans.

29. All signatories hereby stipulate and agree that Bank of America and Bankers Trust, by virtue of their business and location of operations, have been and are now competitors of Prudential in interstate commerce in the extension of mortgage and real estate loans and that such competition is not insubstantial.

FOR THE PLAINTIFF:

/s/ Crossan R. Andersen
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Dated: March 15, 1976

3. *Stipulation Correcting Date of Service of Wasson*

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Attorneys for BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION and BANKAMERICA CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. 75 2109 RFP

Antitrust

UNITED STATES OF AMERICA,
Plaintiff,

v.

BANKAMERICA CORPORATION; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; BANKERS TRUST NEW YORK CORPORATION; BANKERS TRUST COMPANY; THE PRUDENTIAL INSURANCE COMPANY OF AMERICA; E. HORNSBY WASSON; and PAUL A. GORMAN,
Defendants.

STIPULATION

The parties hereto, through their respective counsel, stipulate hereby that the date of commencement of service of E. HORNSBY WASSON as a director of defendant

BANKAMERICA CORPORATION, as the same appears in paragraph 5 on page 2, line 32 of the Answer filed herein on March 25, 1976 by defendants BANKAMERICA CORPORATION and BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION and in paragraph 17 on page 8, lines 17 and 18 of the Stipulation among all the parties hereto, filed herein on March 29, 1976, be corrected by striking "March 18, 1969" and substituting therefor "December 16, 1968".

Dated: April 8, 1976

FOR THE PLAINTIFF:

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4. Answer of BankAmerica Corporation and Bank of America National Trust and Savings Association

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C 75-2109 RFP

UNITED STATES OF AMERICA,
Plaintiff,

v.

BANKAMERICA CORPORATION; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; BANKERS TRUST NEW YORK CORPORATION; BANKERS TRUST COMPANY; THE PRUDENTIAL INSURANCE COMPANY OF AMERICA; E. HORNSBY WASSON; PAUL A. GORMAN,
Defendants.

ANSWER OF BANKAMERICA CORPORATION AND BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION

Defendants BANKAMERICA CORPORATION (hereinafter "BANKAMERICA") and BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (hereinafter "BANK OF AMERICA"), in answer to the Complaint on file herein, admit, deny and allege as follows:

(1) BANKAMERICA and BANK OF AMERICA admit the allegations contained in paragraphs 3, 6 and 14 of the Complaint and affirmatively allege, with respect to paragraph 3, that BANK OF AMERICA is a wholly-owned subsidiary of BANKAMERICA except for directors' qualifying shares.

(2) BANKAMERICA and BANK OF AMERICA lack sufficient information or belief upon the subject matter to enable them to answer the allegations contained in paragraphs 4, 5, 8, 9, 13, 17, 20 and 21 and on this basis deny the allegations contained therein.

(3) BANKAMERICA and BANK OF AMERICA admit and affirmatively allege that the Complaint herein purports to be filed and that these proceedings purport to be instituted under Section 15 of the Clayton Act, as amended (15 U.S.C. § 25); that the Complaint purports to allege a continuing violation by defendants; and that BANKAMERICA and BANK OF AMERICA conduct business and are found within this district. Except as so admitted, BANKAMERICA and BANK OF AMERICA deny the allegations contained in paragraph 1 of the Complaint.

(4) BANKAMERICA and BANK OF AMERICA admit that BANKAMERICA is a bank holding company organized and existing under the laws of the State of Delaware; that it maintains its principal place of business in San Francisco, California; that it has capital, surplus and undivided profits aggregating more than $1,000,000; and that it is not a common carrier subject to the Act to regulate commerce approved February 4, 1887. They affirmatively allege that BANKAMERICA is registered as a bank holding company under the Bank Holding Company Act of 1956, as amended, 12 U.S.C. §§ 1841 et seq.; that BANKAMERICA, by itself, does not both accept deposits and engage in the business of making commercial loans; that it is not a member of the Federal Reserve System; that it is not a member of the Federal Deposit

Insurance Corporation; and that it is not organized under the National Bank Act. Except as so admitted, BANKAMERICA and BANK OF AMERICA deny the allegations contained in paragraph 2 of the Complaint.

(5) BANKAMERICA and BANK OF AMERICA admit and affirmatively allege that E. HORNSBY WASSON (hereinafter "WASSON") maintains offices at Crocker Plaza, San Francisco, California; that WASSON was a director of BANK OF AMERICA and THE PRUDENTIAL INSURANCE COMPANY OF AMERICA (hereinafter "PRUDENTIAL") during the period from February 21, 1967 to June 5, 1975 and was a director of BANKAMERICA and PRUDENTIAL during the period from March 18, 1969 to June 5, 1975; that on or about May 27, 1975, WASSON received actual notice that the United States intended to name him as a defendant in the proceedings initiated by the filing of the Complaint herein; and that on June 5, 1975, WASSON resigned as a director of BANKAMERICA and BANK OF AMERICA. Except as so admitted, BANKAMERICA and BANK OF AMERICA deny the allegations contained in paragraphs 7 and 18 of the Complaint.

(6) BANKAMERICA and BANK OF AMERICA admit and affirmatively allege that a supply of credit is part of the trade and commerce of the United States; that credit is employed in the operation of state and local governments, the expansion of large industries and the establishment of small businesses; that credit in the form of mortgages and real estate loans is used to finance the construction and purchase of commercial and industrial buildings and multiple and single family housing; and that business entities competing in the extension of credit for such purposes include some commercial banks and some life insurance companies. Except as so admitted, BANKAMERICA and BANK OF AMERICA deny the allegations contained in paragraph 10 of the Complaint.

(7) BANKAMERICA and BANK OF AMERICA admit that life insurance companies also extend loans to policy-holders which are secured by the cash value of the life insurance policy. Except as so admitted, BANKAMERICA and BANK OF AMERICA deny the allegations contained in paragraph 11 of the Complaint.

(8) BANKAMERICA and BANK OF AMERICA admit and affirmatively allege that BANK OF AMERICA, as of December 31, 1974, had total consolidated deposits of approximately $51.1 billion and total consolidated resources of approximately $59.3 billion; that its lending services include a range of real estate, commercial and consumer loans and are utilized by customers in many states of the United States; that it had, as of December 31, 1974, total consolidated loans of approximately $30 billion, domestic commercial loans exceeding $10 billion and domestic installment credit of approximately $4.4 billion which included a variety of installment loans to consumers; and that, according to their information and belief, BANK OF AMERICA was one of the nation's largest real estate lenders in 1974, holding over $5 billion in domestic real estate loans. Except as so admitted, BANKAMERICA and BANK OF AMERICA deny the allegations contained in paragraph 12 of the Complaint.

(9) BANKAMERICA and BANK OF AMERICA admit and affirmatively allege that BANK OF AMERICA has regularly used interstate communications, including the mails, telephone and telegraph, to conduct business with some customers located throughout the United States; that some customers have regularly used interstate communications, including the mails, telephone and telegraph, to make deposits, to pay loans, to pay premiums or to apply for and obtain credit made available by it; that some credit advanced by it has been regularly used to finance interstate activities; and that it and BANKAMERICA are engaged in interstate commerce. Except as so admitted, BANKAMERICA and BANK OF

AMERICA deny the allegations contained in paragraph 15 of the Complaint.

(10) BANKAMERICA and BANK OF AMERICA admit that BANK OF AMERICA, by virtue of its business and location of operations, has been and is now in competition, which is not insubstantial, with PRUDENTIAL in the extension of mortgage and real estate loans so that the elimination of competition by agreement between BANK OF AMERICA and PRUDENTIAL would constitute a violation of the antitrust laws. Except as so admitted, BANKAMERICA and BANK OF AMERICA deny the allegations contained in paragraph 16 of the Complaint.

(11) BANKAMERICA and BANK OF AMERICA admit and affirmatively allege that during the period when WASSON served as a director of such defendants, he was annually elected by the shareholders of such defendants, upon nomination by the management of such defendants; and that during the time that WASSON served simultaneously as a director of such defendants and PRUDENTIAL, such defendants had knowledge of such simultaneous service and took no action to terminate or prevent such simultaneous service. Except as so admitted, BANKAMERICA and BANK OF AMERICA deny the allegations contained in paragraph 19 of the Complaint.

(12) BANKAMERICA and BANK OF AMERICA deny the allegations contained in paragraph 22 of the Complaint.

AFFIRMATIVE DEFENSES OF BANKAMERICA and BANK OF AMERICA

First Affirmative Defense

The Complaint fails to state facts sufficient to constitute a claim or claims against either defendant upon which relief may be granted.

Second Affirmative Defense

Prior to the filing of the Complaint, WASSON resigned his directorships with BANKAMERICA and BANK OF AMERICA, and under the retirement policies established for directors of both defendants, WASSON, being over 70 years of age, is ineligible to resume either directorship. As a consequence, the action is moot because no case or controversy remains between plaintiff and either BANKAMERICA or BANK OF AMERICA with respect to WASSON's service as a director.

WHEREFORE, defendants BANKAMERICA and BANK OF AMERICA each pray for judgment as follows:

1) that plaintiff be denied all relief as prayed for against BANKAMERICA and BANK OF AMERICA;

2) for judgment in favor of BANKAMERICA and BANK OF AMERICA;

3) for costs of suit; and

4) for such other and further relief as the Court deems proper.

Dated: March 25, 1976

H. HELMUT LORING
THEODORE SACHSMAN
WILLIAM S. MACKAY

By /s/ [Illegible]
Attorneys for defendants
BANKAMERICA CORPORATION and BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION

5. *Answer of The Prudential Insurance Company of America*

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Attorneys for Defendant
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. 75-2109 RFP

UNITED STATES OF AMERICA,
Plaintiff,

v.

BANKAMERICA CORPORATION; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; BANKERS TRUST NEW YORK CORPORATION; BANKERS TRUST COMPANY; THE PRUDENTIAL INSURANCE COMPANY OF AMERICA; E. HORNSBY WASSON; and PAUL A. GORMAN,
Defendants.

ANSWER OF THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

The Prudential Insurance Company of America ("Prudential"), one of the defendants in the above action, by its attorneys, answers the plaintiff's complaint filed in this cause as follows:

1. Except as expressly admitted in a stipulation between the parties dated March 15, 1976 and to be filed on or about March 29, 1976, a copy of which is attached hereto as Exhibit A, or except as expressly admitted below, Prudential denies each and every allegation of plaintiff's complaint.

2. Prudential hereby waives its right, privilege and claim to assert as a defense to the claims alleged against Prudential, E. Hornsby Wasson ("Wasson"), BankAmerica Corporation ("BankAmerica"), and Bank of America National Trust & Savings Association ("Bank of America"), that such claims, or any of them, are, have become or may be moot by virtue of the fact that Wasson resigned on June 5, 1975 as a Director of BankAmerica and Bank of America. Prudential admits that Wasson was a Director of both Bank of America and Prudential from February 21, 1967 to June 5, 1975 and that he was a Director of BankAmerica and Prudential during the period March 18, 1969 through June 5, 1975; and Prudential agrees that this case may be decided by this Court as though Wasson had never resigned from the Boards of BankAmerica and Bank of America.

3.(a) Except as provided in the final sentence of this subparagraph, Prudential hereby reaffirms its prior waiver, by letter dated September 2, 1975, a copy of which is attached hereto as Exhibit B, of any right, privilege or claim to assert as a defense to the claims alleged against Prudential, that the elimination of competition by agreement between Bank of America and Prudential

would not constitute a violation of any of the provisions of any of the antitrust laws; and waives its right, if any, to a defense based on the claim that the elimination by agreement of competition, if any, between BankAmerica and Prudential would not constitute a violation of any of the provisions of any of the antitrust laws. The waivers contained in the preceding sentence do not in any way limit the right of Prudential to raise any and all legal claims and defenses relating to or based on a claim that BankAmerica and Prudential are not competitors or a claim that BankAmerica is a bank, banking association or trust company or on the application of any statutory exemptions to the antitrust laws to the acts and practices challenged in this proceeding.

(b) Further answering the allegations contained in paragraph 2 of this complaint, Prudential admits that BankAmerica is a holding company registered under the Bank Holding Company Act with capital, surplus and undivided profits aggregating more than $1,000,000; and that it is not a common carrier subject to the Act to regulate commerce approved February 4, 1887.

(c) Further answering the allegations contained in paragraph 3 of this complaint, Prudential admits that Bank of America is a banking association organized under the laws of the United States and that it has capital, surplus and undivided profits aggregating more than $1,000,000 and that BankAmerica controls Bank of America by reason of BankAmerica's ownership of the stock and election of all of the directors of Bank of America.

(d) Further answering the allegations contained in paragraph 15 of this complaint, Prudential admits that it has regularly used interstate communications, including the mails, telephone and telegraph, to conduct business with customers located throughout the United States, and that it is engaged in interstate commerce.

(e) Further answering the allegations contained in paragraph 16 of this complaint, Prudential admits that Bank of America, by virtue of its business and location of operations, has been and is now in competition with Prudential in the extension of mortgage and real estate loans and that such competition is not insubstantial.

/s/ William Simon
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Dated: March 25, 1976

6. *Answer of Paul A. Gorman*

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Attorneys for Defendant
Paul A. Gorman

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. 75 2109 RFP

UNITED STATES OF AMERICA,
Plaintiff,
v.

BANKAMERICA CORPORATION; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; BANKERS TRUST NEW YORK CORPORATION; BANKERS TRUST COMPANY; THE PRUDENTIAL INSURANCE COMPANY OF AMERICA; E. HORNSBY WASSON; and PAUL A. GORMAN,
Defendants.

ANSWER OF PAUL A. GORMAN

Paul A. Gorman ("Gorman"), one of the defendants in the above action, by his attorneys, answers the plaintiff's complaint filed in this cause as follows:

1. Except as expressly admitted in a stipulation between the parties dated March 15, 1976 and to be filed on or about March 29, 1976, a copy of which is attached hereto as Exhibit A, Gorman denies each and every allegation of plaintiff's complaint.

/s/ William Simon
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Attorneys for Defendant
Paul A. Gorman

Dated: March 25, 1976

7. Answer of Bankers Trust Company and Bankers Trust New York Corporation

---

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Attorneys for Defendants
Bankers Trust Company and Bankers
Trust New York Corporation

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. 75 2109 RFP

Antitrust

UNITED STATES OF AMERICA,
Plaintiff,
v.

BANKAMERICA CORPORATION; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; BANKERS TRUST NEW YORK CORPORATION; BANKERS TRUST COMPANY; THE PRUDENTIAL INSURANCE COMPANY OF AMERICA; E. HORNSBY WASSON; and PAUL A. GORMAN,
Defendants.

ANSWER

Defendants, Bankers Trust Company ("Bankers Trust") and Bankers Trust New York Corporation

("Bankers"), for their answers to the complaint against them, by their undersigned attorneys

1. Admit that the complaint purports to be filed and these proceedings instituted against the defendants under Section 15 of the Clayton Act, as amended (15 U.S.C. § 25), and that the complaint purports to have been brought in order to prevent and restrain the continuing violation by defendants of Section 8 of the Clayton Act (15 U.S.C. § 19); and, except as so admitted, deny the allegations of paragraph 1 of the complaint with respect to defendants Bankers Trust and Bankers and deny knowledge or information sufficient to form a belief as to the allegations of said paragraph with respect to all defendants other than Bankers Trust and Bankers.

2. Deny knowledge or information sufficient to form a belief as to, and therefore deny, the allegations of paragraphs 2, 3, 6, 7, 12, 14, 16, 18 and 19 of the complaint, except and only to the extent that said allegations may have been stipulated with plaintiff under date of March 15, 1976.

3. Admit that Bankers is a bank holding company registered under the Bank Holding Company Act, as amended (12 U.S.C. §§ 1841 et seq.), and organized and existing under the laws of the State of New York, that it maintains its principal place of business in New York, New York, that it has capital, surplus, and undivided profits aggregating more than $1,000,000, and that it is not a common carrier subject to the Act to regulate commerce approved February 4, 1887; and except as so admitted, deny the allegations and conclusions of law contained in paragraph 4 of the complaint.

4. Admit that Bankers Trust is a bank and trust company organized under the laws of the State of New York, that it is a wholly-owned subsidiary of Bankers, that its principal place of business is in New York, New York and that it has capital, surplus, and undivided

profits aggregating more than $1,000,000; and except as so admitted, deny the allegations of paragraph 5 of the complaint. Answering further, defendant Bankers Trust avers that it is a member of the Federal Reserve System.

5. Admit that defendant Paul A. Gorman ("Gorman") for a certain period of time has been and is now a director of defendants Bankers, Bankers Trust and The Prudential Insurance Company of America ("Prudential"); except as so admitted, deny knowledge or information sufficient to form a belief as to the allegations of paragraph 8 of the complaint.

6. Admit that plaintiff purports to define the term "corporate defendants" in the first sentence of paragraph 9 of the complaint; except as so admitted, deny the allegations of paragraph 9 of the complaint.

7. Admit that a supply of credit is a part of the trade and commerce of the United States, that credit is employed in the operations of state and local governments, the expansion of large industries and the establishment of small businesses, that credit in the form of mortgages and real estate loans is used to finance the construction and purchase of commercial and industrial buildings, multiple and single family housing, and that business entities competing in the extension of credit for such purposes include some commercial banks and some life insurance companies; except as so admitted, deny the allegations of paragraph 10 of the complaint.

8. Deny the allegations of paragraph 11 of the complaint, except and only to the extent that said allegations may have been stipulated with plaintiff under date of March 15, 1976.

9. Admit that as of December 31, 1974, Bankers Trust had total deposits of approximately $16.1 billion, total assets of approximately $19.2 billion; that its lending services include a range of real estate, commercial and

consumer loans and are utilized by customers in many states of the United States; that Bankers Trust, as of December 31, 1974, had total loans of approximately $11.5 billion, including real estate mortgage loans, commercial loans, and installment credit which includes a variety of installment loans to customers; answering further, aver that the last sentence of paragraph 13 is ambiguous and immaterial in light of the aforesaid stipulation of March 15, 1976; except as herein expressly admitted, deny the allegations of paragraph 13 of the complaint.

10. Admit that Bankers Trust and Bankers are engaged in interstate commerce, that Bankers Trust has regularly used interstate communications, including the mails, telephone and telegraph, to conduct business with some customers located throughout the United States, that some customers of Bankers Trust have regularly used interstate communications, including mails, telephone and telegraph, to make deposits, to pay loans, or to apply for and obtain credit made available by it, and that some credit advanced by Bankers Trust has been regularly used to finance interstate activities; except as so admitted, deny the allegations of paragraph 15 of the complaint with respect to defendants Bankers Trust and Bankers, and deny knowledge or information sufficient to form a belief as to the allegations of said paragraph with respect to all defendants other than Bankers Trust and Bankers, except and only to the extent that said allegations may have been stipulated with plaintiff under date of March 15, 1976.

11. Deny the allegations of paragraphs 17, 20, 21 and 22 of the complaint, except and only to the extent that said allegations may have been stipulated with plaintiff under date of March 15, 1976.

FIRST AFFIRMATIVE DEFENSE

12. The complaint fails to state a claim upon which relief can be granted against defendants.

SECOND AFFIRMATIVE DEFENSE

13. This Court lacks jurisdiction.

THIRD AFFIRMATIVE DEFENSE

14. The Northern District of California is not the proper venue for this action against answering defendants.

FOURTH AFFIRMATIVE DEFENSE

15. This proceeding is discriminatory and unnecessary as to defendants Bankers and Bankers Trust, and equitable relief should be denied and the complaint dismissed as to them in that:

(a) Plaintiff has not proceeded against all banks or bank holding companies that have interlocking directorates with insurance companies.

(b) Plaintiff has indicated it does not expect to proceed against all such interlocks, stating to this Court and the public that it expects that the filing of the complaint and the successful litigation of the action against other defendants in another pending case (*United States* v. *Crocker National Corporation, et al.*, Civil Action No. 75-2108 RFP (N.D. Cal.)) will cause individual directors and corporations to voluntarily terminate directorates which violate Section 8 of the Clayton Act.

(c) Bankers and Bankers Trust were named as defendants in this proceeding by plaintiff solely to help cure any alleged deficiency in plaintiff's case arising from the resignation of defendant Wasson as a director of defendants BankAmerica Corporation ("BankAmer-

ica") and Bank of America National Trust & Savings Association ("Bank of America") after plaintiff gave said defendant Wasson notice that it intended to name him as a defendant herein.

(d) Until such resignation Bankers and Bankers Trust had not received any such notice, or any notice of the threat of this suit, and upon information and belief it was not contemplated that they would be named defendants.

(e) Having named Bankers and Bankers Trust as defendants, plaintiff nevertheless is proceeding in this matter against the aforesaid Wasson, BankAmerica and Bank of America, and is also seeking to resolve the legal issues in the other case referred to in paragraph (b) above.

(f) Bankers and Bankers Trust have permitted defendant Gorman to serve as a director while simultaneously serving as a director of Prudential because they have understood such contemporaneous service to be lawful, but will act to voluntarily terminate such interlocking directorship if interlocking directorates with insurance companies are determined to violate Section 8 of the Clayton Act.

(g) Plaintiff is not seeking any adjudication or order against any competitor of Bankers or Bankers Trust in the State of New York, where they have their principal places of business, but, on information and belief, plaintiff is relying for effective relief against said competitors upon the principle stated in paragraph (b) above, while not relying upon said principle as to Bankers and Bankers Trust.

WHEREFORE, defendants Bankers and Bankers Trust demand judgment dismissing the complaint, together with the costs and disbursements of this action and such other and further relief as the Court deems just and proper.

Dated: New York, New York
March 26, 1976

EDWARD WOLFE
RICHARD W. REINTHALER
WHITE & CASE

By /s/ Edward Wolfe
EDWARD WOLFE
Attorneys for Defendants
Bankers Trust Company and
Bankers Trust New York
Corporation

Opposition



Office - Supreme Court, U.S.
FILED
MAY 7 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1487

In the Supreme Court of the United States

OCTOBER TERM, 1981

BANKAMERICA CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether interlocking directorates linking major banks and their parent holding companies with insurance companies that compete directly with the banks are exempt from Section 8 of the Clayton Act, 15 U.S.C. 19, which prohibits interlocking directorates among large competing corporations.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1487

BANKAMERICA CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 656 F.2d 428. The opinion of the district court (Pet. App. 51a-85a) is reported at 422 F.Supp. 686.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 1981, and a petition for rehearing and suggestion for rehearing en banc were denied on November 10, 1981 (Pet. App. 86a-87a). The petition for a writ of certiorari was filed on Febru-

ary 8, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8 of the Clayton Act, 15 U.S.C. 19, restricts horizontal interlocks among corporate personnel. The first three paragraphs of Section 8 apply to various management interlocks among banks, banking associations, savings banks, and trust companies. The first paragraph provides that, with certain limited exceptions, no director, officer, or employee of any member bank of the Federal Reserve System shall at the same time be a director, officer, or employee of any other bank, banking association, savings bank, or trust company. The second paragraph prescribes certain grandfather protections for interlocks in effect in 1935, when Section 8 of the Clayton Act was amended, and the third paragraph in turn authorizes the Board of Governors of the Federal Reserve System to enforce this prohibition.

The fourth paragraph of Section 8, the provision at issue here, states that "[n]o person at the same time shall be a director in any two or more corporations * * * other than banks, banking associations, trust companies, and common carriers subject to the [Interstate Commerce Act] * * * if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws."

2. In October 1975 the United States filed two civil complaints in the United States District Court for the Northern District of California, alleging that the interlocking directorates linking three major

banks and their parent holding companies with four major insurance companies violated Section 8 of the Clayton Act.[1] The parties filed substantially identical stipulations of fact in the two cases. Petitioners admitted the existence of the alleged interlocks, and stipulated that the banks are "competitors" of the insurance companies " 'in the extension of mortgage and real estate loans[,] and that such competition is not insubstantial' " (Pet. App. 7a, 53a-54a).[2] As the court of appeals observed, "[t]he substantial nature of the competition potentially affected is indicated

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[1] The complaint in *United States* v. *Crocker National Corp.*, alleged that three directors of Crocker National Corporation, a bank holding company, and its wholly-owned subsidiary, Crocker National Bank, also serve as directors of the Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, and the Mutual Life Insurance Company of New York. The complaint in *United States* v. *BankAmerica Corp.*, alleged that until shortly before the filing of the complaint, a director of BankAmerica Corporation, a bank holding company, and its wholly-owned subsidiary, Bank of America National Trust and Savings Association, also served as a director of Prudential Life Insurance Company. That director resigned from the boards of the bank and bank holding company after the government notified him of its intent to file the complaint. The complaint also alleged that a director of Bankers Trust New York Corporation, a bank holding company, and its wholly-owned subsidiary, Bankers Trust Company, serves as a director of Prudential Life Insurance Company.

The interlocked corporations and the individual directors were named as defendants. Petitioners include all of the defendants in both cases except two individual directors, one of whom has agreed to a consent judgment (Pet. App. 6a n.2, 52a n.1).

[2] Thus, it is not disputed that the banks and insurance companies in question are direct competitors in the same product and geographic markets.

by stipulations that at the beginning of 1975, outstanding real estate loans of the three banks totaled $6.5 billion and those of the four insurance companies totaled $32 billion" (*id.* at 7a).[3]

The district court granted petitioners' motions for summary judgment and dismissed the government's complaints (Pet. App. 51a-85a). It concluded that the phrase "other than banks" in the fourth paragraph of Section 8 exempts from the coverage of that paragraph not only interlocks between banks, which are separately regulated by the first three paragraphs of Section 8, but also interlocks such as those at issue here, involving banks and their nonbank competitors.

The court of appeals reversed (Pet. App. 1a-50a). The court concluded that, viewing the statutory provision as a whole, the exemption for "banks" prescribed in the fourth paragraph of Section 8 relates back to the first three paragraphs, which regulate only interlocks between two or more banks, not interlocks between a bank and its nonbank competitors (*id.* at 8a-9a). The court also looked to the purposes of Section 8, as described in the legislative history: the promotion of competition by prohibiting interlocking directorates among large competing corporations, and

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[3] The parties also stipulated that the corporate defendants are engaged in interstate commerce and that they have capital, surplus and undivided profit in excess of $1,000,000 (Pet. App. 53a-54a)—prerequisites to the application of the statutory prohibition. The parties further stipulated that the bank holding companies control their wholly-owned subsidiary banks "by and through" ownership of the stock and election of all of their directors, and that they are bank holding companies subject to the Bank Holding Company Act, 12 U.S.C. 1841 *et seq.* (Pet. App. 54a).

the restraining of concentration of control over capital by prohibiting various personnel interlocks among banking institutions. Interpreting Section 8 to prohibit interlocking directorates among competing banks and insurance companies would further both of these purposes, the court noted, while exempting such interlocks from all restrictions would serve no congressionally articulated purpose (*id.* at 11a-19a).

The court also exhaustively reviewed the congressional materials upon which the district court relied in concluding that Congress intended the fourth paragraph of Section 8 to exempt interlocks between a bank and its nonbank competitors, in addition to interlocks among banks subject to the first three paragraphs, and found them unpersuasive (Pet. App. 25a-37a). The court's conclusion was reinforced by the traditional presumption against creating exemptions from the coverage of the antitrust laws (*id.* at 19a-21a).[4] Judge Kennedy dissented (*id.* at 48a-50a).

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[4] The court also concluded that the bank holding company/insurance company interlocks violated the statute. It held that, for purposes of determining whether the parent competes with another corporation, the business of a subsidiary must be attributed to the parent if the parent substantially controls the policies of the subsidiary. In this case, the extent of control exercised by the parent over the subsidiary was established as a matter of law by the stipulated record because of the distinct statutory and regulatory restrictions applicable to a bank holding company subject to the Bank Holding Company Act (Pet. App. 37a-40a).

Finally, the court of appeals rejected the contention that the interlocks at issue here are excluded from the coverage of Section 8 of the Clayton Act by virtue of Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b). Pet. App. 41a-48a. Petitioners have not presented that argument in this Court.

ARGUMENT

Petitioners do not dispute that Section 8 of the Clayton Act generally proscribes interlocking directorates among "any two or more corporations" that compete in interstate commerce, including insurance companies and any other companies not subject to an explicit statutory exemption. Nor do they question the proposition that interlocks among commercial banks, mutual savings banks, and trust companies are covered by the statute. They submit, however, that an interlock between a bank and an insurance company is wholly immune from scrutiny under Section 8, even though the institutions involved are direct competitors in the same geographic and product markets and even though substantial amounts of interstate commerce are involved. Petitioners have offered no plausible explanation why Congress would have intended to exempt such anticompetitive interlocks from the reach of this broad prophylactic statute, and the plain meaning of the statute does not warrant the restrictive interpretation that they propose. Moreover, the court of appeals, after exhaustively analyzing the legislative history, found that there was nothing in the legislative record that would justify fashioning such a loophole.

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Indeed, petitioners acknowledge that no other court of appeals has yet considered a case involving interlocking directorates between banking and nonbanking corporations. Moreover, contrary to petitioners' contention, there is no reason to believe that the decision below will have serious adverse consequences for the banking and insurance industries generally. For these reasons, review in the present case is not warranted.

1.*a*. As the court of appeals concluded, the most natural reading of the literal language of the general prohibition contained in the fourth paragraph of Section 8 of the Clayton Act—which is applicable to persons serving as directors of two or more corporations "other than banks"—is that the general prohibition applies unless *both* interlocked corporations are banks. This is so for three separate reasons.

First, the exception prescribed in the fourth paragraph of Section 8 is written in the plural: it applies to "banks." Thus, giving the terminology used by Congress its "ordinary" and "common meaning" (*Perrin* v. *United States*, 444 U.S. 37, 42 (1979)), it follows that only interlocks involving two or more "banks"—not interlocks involving a single "bank" and a nonbank competitor—were intended to be excluded and treated separately in the statute. Congress certainly was capable of excluding interlocks involving a single bank, and could have stated that intention by providing an exemption for interlocks involving companies "none of which is a bank." Indeed, Congress used similar phraseology in the preceding clause in the same statutory provision, which defines the corporations intended to be embraced in the following terms: "any one of which has [assets] aggregating more than $1,000,000."

Second, the general prohibition and the exclusion therefrom follow three paragraphs specifically regulating interlocks between two or more banks. Thus, viewing Section 8 as a whole and bearing in mind "the structure of the Act" (*Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205, 211 (1979)), the most natural reading of the exclusion of "banks" in the fourth paragraph is that it applies to those situations in which *only* banks are involved in the interlock and which therefore are subject to spe-

cial regulatory treatment in the first three paragraphs. The legislative history supports this reading as well. That history indicates that the exemption for banks was added to ensure that interlocks between banks—interlocks governed by the specific prohibitions and exemptions prescribed in the first three paragraphs—would not also be subject to the general, and in some respects inconsistent, rule of the fourth paragraph.[5]

Third, Congress made quite clear that it intended the fourth paragraph to bar interlocking directorates between competing corporations generally and, in addition, intended the first paragraph to bar interlocking directorates specifically between banks. This inclusive statutory scheme does not suggest an intent to exempt certain interlocks from antitrust scrutiny simply because only one of the interlocked corporations is a bank. To the contrary, in view of the comprehensive scope of the statute, petitioners' restrictive construction "would create a loophole in

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[5] See, *e.g.*, 51 Cong. Rec. 16271-16272 (1914) (remarks of Rep. Webb and Rep. Sherley), indicating that the Conference Committee added the exemption for banks in the fourth paragraph to ensure that interlocks between banks, which were prohibited only when one bank had deposits, capital surplus, and undivided profits of at least $5,000,000, would not be subject also to the general prohibition in the fourth paragraph, which applies whenever one of the interlocked corporations has capital, surplus, and undivided profits totalling $1,000,000 or more.

It is instructive in this regard that, while the same statutory exemption applies to "common carriers" subject to the Interstate Commerce Act, Section 20a(12), 49 U.S.C. 20a (12), likewise regulated interlocking directorates between two or more common carriers. (Section 20a(12) was added to the Interstate Commerce Act by the Transportation Act of 1920, ch. 91, Section 439, 41 Stat. 494.)

the statute that Congress simply did not intend to create" (*United States* v. *Naftalin*, 441 U.S. 768, 777 (1979)).

b. The construction given by the court of appeals to the exclusion prescribed in paragraph 4 also substantially furthers the congressional purposes underlying the Clayton Act.[6] As the court of appeals observed (Pet. App. 11a-12a), and as this Court repeatedly has recognized (see note 7, *infra*), the Clayton Act was enacted to supplement the Sherman Act and to remedy its perceived deficiencies. In particular, Congress sought "to arrest the creation of trusts, conspiracies, and monopolies in their incipi-

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[6] Thus, petitioners' claims fail not only because they are inconsistent with the text and structure of the Act, but also because they would do violence to its clearly articulated policy. See *Rose* v. *Lundy*, No. 30-846 (Mar. 3, 1982), slip op. 8-9: "[W]e must analyze the policies underlying the statutory provision to determine its proper scope. *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975) ('[i]n expounding a statute we must . . . look to the provision of the whole law, and to its object and policy. [citation omitted]'); *United States* v. *Bacto-Unidisk*, 394 U.S. 784, 799 (1969) ('where the statute's language seem[s] insufficiently precise, the 'natural way' to draw the line 'is in light of the statutory purpose' [citations omitted]'); *United States* v. *Sisson*, 399 U.S. 267, 297-298 (1970) ('[t]he axiom that courts should endeavor to give statutory language that meaning that nurtures the policies underlying the legislation is one that guides us when circumstances not plainly covered by the terms of the statute are subsumed by the underlying policies to which Congress was committed'); *Unexcelled Chemical Corp.* v. *United States*, 345 U.S. 59, 64 (1953) ('[a]rguments of policy are relevant when for example a statute has an hiatus that must be filled or there are ambiguities in the legislative language that must be resolved')."

ency and before consummation"[7] by, *inter alia*, prohibiting interlocking directorates. S. Rep. No. 698, 63d Cong., 2d Sess. 1 (1914). Section 8 was enacted in response to the President's recommendation for legislation "which will effectually prohibit and prevent such interlockings of the *personnel* of the directorates of great corporations—banks and railroads, industrial, commercial, and public-service bodies—as in effect result in making * * * those who affect to compete in fact partners and masters of some whole field of business." *Id.* at 14 (emphasis in original); see also H.R. Rep. No. 627, 63d Cong., 2d Sess. 19 (1914). Congressman Barkley similarly observed that "[t]here can be no real competition between companies engaged in commerce where the same persons control the policy of the different companies." 51 Cong. Rec. 9554 (1914). The interlocking directorates at issue here, involving major corporations engaged in direct competition, squarely implicate this policy.

Moreover, Congress was specifically concerned about the impact of personnel interlocks among financial institutions. The House Judiciary Committee described the paragraph in Section 8 that prohibits a wide variety of personnel interlocks among banking institutions as intended

> to prevent as far as possible control of great aggregations of money and capital through the medium of common directors between banks and banking associations, the object being to prevent the concentration of money or its distribution through a system of interlocking directorates.

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[7] See, *e.g.*, *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 318 n.32 (1962); *United States* v. *E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 589 (1957).

H.R. Rep. No. 627, *supra*, at 19. Reading the "other than banks" exemption in the fourth paragraph to exempt only interlocks among banks, which nevertheless remain subject to regulation by the first three paragraphs, fulfills the expressed congressional purposes of preventing interlocking directorates between competing corporations generally and specifically of preventing interlocks that could lead to control of great aggregations of capital—here, in the extension of mortgage and real estate loans.

Conversely, to expand the reach of the "other than banks" clause to exempt interlocking directorates between banks and their nonbank competitors from any restrictions, as petitioners urge, would substantially undermine the purposes underlying both paragraphs 1 and 4 and create a gap in the coverage of Section 8 that has no evident support in the background or purposes of that Section. Petitioners, for example, cite no evidence that Congress believed interlocking directorates between banks and their nonbank competitors to be less anticompetitive than other interlocks among large competing corporations, that Congress was unconcerned about concentration of control over capital in situations where one interlocked lender happens not to be a bank, or that Congress perceived any reason for permitting such interlocks while generally banning interlocks among other large competitors.[8] Petitioners' interpretation therefore is

[8] Petitioners suggest (Pet. 13), albeit again without identifying an underlying rationale, that it was Congress' purpose to "deal specifically and selectively—and not as part of more general statutory provisions—with interlocking relationships between banks and other companies." However, the statutes upon which they rely—all of which were enacted more than 20 years after Section 8 of the Clayton Act—are not designed to preserve competition by prohibiting inter-

contrary to this Court's admonition that exemptions from the antitrust laws are to be narrowly construed to effectuate the specific legislative purpose—a principle applying not only to implicit exemptions, but to "express statutory exemptions" as well. See, *e.g.*, *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205, 231 (1979); *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973); *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956).

c. The court of appeals also reviewed in careful and extensive detail the post-enactment congressional materials on which petitioners rely (Pet. 11-14) and found nothing to support an exemption for this single category of interlocking directorates among large competing corporations (Pet. App. 25a-37a).[9] That

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locks among horizontal competitors, the evil to which Section 8 is directed; they impose special requirements on *vertical* interlocks involving banks. See 12 U.S.C. 78; 15 U.S.C. 79g(c); 15 U.S.C. 80a-10(b)(2); 15 U.S.C. 80a-10(c); 16 U.S.C. 825d.

[9] Amici—but not petitioners—also cite portions of the legislative history of the Clayton Act for the proposition that Congress intended to exempt from the fourth paragraph ininterlocks involving a bank and a nonbank competitor. See Brief of American Council of Life Insurance at 15-16 & n.14; Brief of the New York Clearing House Association, et al., at 8-9. As the court of appeals concluded (Pet. App. 25a-30a), however, these segments, to the extent that they are relevant at all, demonstrate only that Congress intended to ensure that interlocks between banks would not be subject to the fourth paragraph as well as the preceding three paragraphs.

Both amici rely on the statement by Samuel Untermyer during the hearings that the Committee had failed to cover service by a life insurance company director as a director of a bank. That statement, however, was part of a discussion of vertical interlocking relationships and, in any event, it ap-

conclusion is fully warranted. Such evidence by its nature forms a hazardous basis from which to infer an intent to create an exemption on the part of an earlier Congress—especially where, as here, the earliest item upon which they rely is a law enacted almost 20 years after the Clayton Act was passed. See, *e.g.*, *Consumer Product Safety Commission* v. *GTE Sylvania*, 447 U.S. 102, 117-118 n.13 (1980); *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758 (1979). In any event, the particular materials on which petitioners rely do not support the assertion that the court of appeals' decision is in error.

As the court of appeals explained (Pet. App. 32a), the enactment and repeal of Section 8A of the Clayton Act are wholly irrelevant to the issue presented here. That provision, enacted in 1933 as part of the Glass-Steagall Act, prohibited interlocking relationships between banks and firms that make loans secured by stock or bond collateral. It formed part of a series of legislative restrictions on banks' freedom to risk depositors' funds on stock speculation, and, unlike Section 8, it had nothing to do with pro-

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parently pertained to the scope of the bank paragraphs of the Section, not the present paragraph 4. 1 *Trust Legislation: Hearings on Trust Legislation Before the House Comm. on the Judiciary*, 63d Cong., 2d Sess., Pt. 20, 823 (1914). Amici also place great reliance on an exchange on the House floor, in which Congressman Mann objected to the Conference Committee's addition of the exemption for banks in paragraph 4. But, as the court of appeals observed (Pet. App. 28a-29a n.58), the conferees responded that the exemption did not change the effect of the fourth paragraph, but merely made it clear that bank interlocks subject to the first three paragraphs were not also covered by the fourth. Thus, the point of order that the conferees had exceeded their authority by adding new matter was overruled. 51 Cong. Rec. 16269-16273 (1914).

moting or preserving competition in the extension of loans. See *Board of Governors of Federal Reserve System* v. *Investment Co. Institute*, 450 U.S. 46, 61-62 (1981); *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 629-634 (1971). Accordingly, there is no support whatever for petitioners' contention (Pet. 13) that Section 8A was repealed in 1935 for the specific purpose of permitting anticompetitive interlocks between banks and their nonbank competitors.[10]

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[10] Section 8A was added to the Clayton Act by Section 33 of the Banking Act of 1933, ch. 89, 48 Stat. 194 (the "Glass-Steagall Act"). Sections 20 and 21(a)(1) of the Act, 48 Stat. 188-189, prohibited banks from dealing in securities, and Section 32, 48 Stat. 194, prohibited interlocks between banks and firms dealing primarily in securities. Section 7 of the Act, 48 Stat. 167, restricted banks' ability to make loans secured by stock or bond collateral. Section 33, which added the new Section 8A of the Clayton Act, prohibited interlocks between banks and firms that made loans secured by such collateral, thus preventing banks from maintaining interlocking relationships with brokers or others who might borrow from the banks and lend the funds in exchange for stock or bond collateral. The existence or absence of competition between the interlocked firms was not relevant to the applicability of Section 8A.

Nor did the repeal of Section 8A indicate any congressional purpose with respect to interlocking directorates between competing banks and nonbanks, as the district court believed (Pet. App. 59a-60a). Repeal of Section 8A was one of the "technical amendments" included in Title III of the Banking Act of 1935, ch. 614, 49 Stat. 717-718. The House Report indicated that the amendments in Title III "make no fundamental changes in the existing banking laws." H.R. Rep. No. 742, 74th Cong., 1st Sess. 2 (1935). The district court cited (Pet. App. 60a) only page 24 of the House Report for the proposition that Congress, by repealing Section 8A, intended affirmatively to authorize interlocks between banks and competing institutions. However, there simply is nothing on that page even remotely suggesting such a purpose.

Petitioners also rely (Pet. 13-14) on a proposed amendment to the Depository Institution Management Interlocks Act, 12 U.S.C. (Supp. II) 3201-3207. The amendment was introduced when the legislation was considered by the House Committee on Banking, Finance and Urban Affairs, after the district court decision holding the interlocks in these cases exempt from the Clayton Act. It would have amended the fourth paragraph of Section 8 to make clear that interlocks involving banks and competing nonbanks are subject to the Clayton Act. H.R. Rep. No. 95-1383, 95th Cong., 2d Sess. 201-202 (1978) (additional views of Rep. St. Germain). The legislative history indicates that the amendment was rejected not on the merits, but on procedural grounds. Amending the Clayton Act would have required consideration by a different congressional committee. For that reason, a provision in the bill repealing the first three paragraphs of Section 8, which are in some respects inconsistent with the requirements of the Depository Institution Management Interlocks Act, also was deleted. See H.R. Rep. No. 95-1383, *supra*, at 241 (minority views). When a similar amendment, which would have accomplished the same result as the proposed amendment to the Clayton Act, was offered on the floor of the House, it was rejected on a point of order, because amendments to the Clayton Act were not germane and were within the jurisdiction of the Judiciary Committee, which had not considered the bill. 124 Cong. Rec. 33815-33818 (1978).

Contrary to petitioners' contention (Pet. 13-14), the other bills proposed but not enacted in recent Sessions of Congress—beginning in 1965, more than 50 years after passage of the Clayton Act—are equally lacking in value as evidence of a congressional intent in the Clayton Act to exempt from Section 8 interlocking directorates between large banks and nonbank cor-

porations with which they are in substantial competition. Moreover, in each case, the proposed bills provided for substantial revisions of the Clayton Act, and would have extended the reach of Section 8 much beyond its present limits. None of the bills was aimed specifically at the issue in this case (see Pet. App. 60a). Finally, as this Court frequently has pointed out (see, *e.g.*, *United States* v. *Sheffield Board of Commissioners*, 435 U.S. 110, 135 (1978); *United States* v. *Wise*, 370 U.S. 405, 411 (1962)), inferences of legislative intent based on the *inaction* of subsequent Congresses are hazardous and unreliable. There is no basis for departing from that rule of statutory construction here.

d. Petitioners also suggest (Pet. 4, 11-12) that the decision below is contrary to more than 60 years of consistent administrative interpretation that Section 8 does not apply to interlocks between banks and their nonbank competitors. In support of this proposition, however, petitioners cite no official policy statement by the Department of Justice. And, although it is true, as petitions observe (*id.* at 11), that no action was brought by the Justice Department prior to 1975 challenging bank/nonbank interlocks, it is equally true, as the annotations to that Section reveal, that very few enforcement actions have ever been brought challenging interlocks of *any* kind. Indeed, this Court noted in *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 634 n.8 (1953), that the government did not focus its enforcement efforts on Section 8 in the 35-year period following enactment of the Clayton Act. Against this background, the failure to bring an action specifically challenging a bank/nonbank interlock surely cannot be viewed as reflecting an affirmative (much less contemporaneous) administrative determination by the Justice Department that such interlocks are lawful.

Petitioners also cite a 1950 report by the Federal Trade Commission on interlocking directorates indicating that interlocks between banks and nonbank corporations are lawful. H.R. Doc. No. 652, 81st Cong., 2d Sess. 10 (1950). The court of appeals (Pet. App. 35a n.73) expressed uncertainty whether this report even was intended to refer to horizontal interlocks between banks and other corporations with which they competed, or whether it was instead limited to vertical interlocks between banks and other corporations with which they conducted business. In any event, far from disagreeing with the position of the United States in this case, the Federal Trade Commission has itself held that interlocking directorates between competing banks and nonbanks violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in an opinion explicitly rejecting the arguments now presented by petitioners. *In re Perpetual Federal Savings & Loan Association*, 90 F.T.C. 608 (1977), vacated on other grounds, 94 F.T.C. 491 (1979). Thus, the views of both governmental bodies charged by Congress with responsibility for construing and enforcing the Clayton Act are in harmony.[11]

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[11] The court of appeals was also correct in concluding that the bank holding company/insurance company interlocks are prohibited by Section 8. The court of appeals concluded that interlocks between a corporation and the parent of its competitor do not automatically violate Section 8, but may do so if the parent controls the policies of its subsidiary. That conclusion simply recognizes business realities: a parent that controls the policies of its subsidiary is in a practical sense in competition with the subsidiary's competitors. A contrary interpretation would be highly artificial and invite circumvention of the statute. Nor can it be seriously questioned that bank holding companies, subject to the Bank Holding Company Act, control the operations of their subsidiary banks (see Pet. App. 37a-40a).

2. Petitioners' concern that the court of appeals' decision will cause widespread disruption in the insurance and banking industries if not immediately reviewed by this Court is without merit. As an initial matter, it is not clear how many interlocking directorates between large competing banks and nonbanks in fact exist. The statistics cited by petitioners (Pet. 4, 8) concerning the numbers of insurance company directors who also serve as bank directors are not documented and therefore are of uncertain reliability;[12] moreover, they do not purport to identify interlocks among corporations of the requisite size and they fail to take into account whether the corporations in question actually compete and therefore fall within the coverage of Section 8.

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[12] Petitioners claim (Pet. 4) that the government has estimated that 40% of the directors of insurance companies in the United States also serve as directors of banks. We are unaware of any basis for that claim, because the Department of Justice has performed no such study. There also are no findings of fact on the point in this litigation; the only record before the district court consisted of stipulations of fact, which contain no reference to this issue. The district court's reference to the 40% statistic (Pet. App. 58a) was based on an unsworn assertion of *defense counsel* in oral argument, for which no citation was provided, and the court of appeals simply repeated the district court's reference to the statistic (Pet. App. 7a).

Petitioners (Pet. 4 n.4) and amicus American Council of Life Insurance (Br. 3-4) also rely on a survey of "some of the major life insurance companies which are members of the Council" for the proposition that "roughly" 50% of their directors are also directors of banks. But they provide no specific information to indicate how many companies were surveyed or whether the companies were typical of insurance companies generally, and they do not in any event assert that the banks and insurance companies in question actually com-

In addition to the uncertainty regarding the number of covered interlocks that are in existence, it must be emphasized that the decision below is the law only of the Ninth Circuit.[13] It is significant in this regard that Section 8 is enforced principally in administrative proceedings conducted by the responsible federal regulatory agencies (15 U.S.C. 21) or through an injunctive action brought by the Attorney General pursuant to 15 U.S.C. 25. The Clayton Act does not impose criminal liability for a violation of Section 8. Nor is there a realistic possibility that a violation of the prophylactic prohibition in Section 8, standing alone, would give rise to treble damage liability. In order to recover such damages, the plaintiff must show more than a mere violation of the antitrust laws; he must show that he was injured in his business or property as a result of the violation. See generally *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-487 (1977) (proof of a violation of a prophylactic antitrust provision, Section 7 of the Clayton Act, 15 U.S.C. 18, does not itself establish antitrust injury). It is most unlikely that a plaintiff could establish the requisite causal relationship between an interlock violative of Section 8 and injury to his business or property. Some addi-

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pete with one another in such a manner as to trigger the application of Section 8.

[13] Petitioners also appear to suggest (Pet. 6, 8-9, 15) that the decision below is not definitive even in the Ninth Circuit, because the panel majority was composed of a circuit and district judge. Obviously, however, the decision below is the law of the circuit, and, perhaps more to the point, petitioners' suggestion for rehearing en banc was denied without even a single judge of the full court of appeals requesting a vote on the question (Pet. App. 87a).

tional conduct that actually restrained competition and independently violated the antitrust laws—not merely the existence of interlocked directors—presumably would be the cause of whatever injury the plaintiff might sustain.

For the foregoing reasons, insurance companies and banks and their directors elsewhere in the Nation who disagree with the Ninth Circuit's decision would not expose themselves to criminal or treble damage liability by maintaining the status quo and contesting the application of Section 8 in an appropriate enforcement action brought before an administrative agency or in judicial proceedings in another circuit. If a conflict between the circuits then should develop, there will be time enough for this Court to intervene.

Finally, even where a violation of Section 8 is found, in the Ninth Circuit or elsewhere, the government would not seek—and the courts, in the exercise of their equitable discretion, would not be expected to order—an immediate removal of the directors in question from one or the other of their positions if such removal would cause undue disruption in the affairs of the corporation concerned. An orderly transition to compliance with the Act surely would be permitted. See, *e.g.*, *Weinberger* v. *Romero-Barcelo*, No. 80-1990 (Apr. 27, 1982).[14]

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[14] See also *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 61 (1975), quoting *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944):

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs * * *.

There also is no reason to believe, as petitioners suggest (Pet. 7-8), that banks and insurance companies will suffer because of a lack of skilled directors caused by the prohibition of Section 8.[15] While experienced and competent directors are essential for insurance companies and banks, just as they are for other corporations, we know of no evidence to suggest that there are so few qualified persons in the business community that interlocking directorates between large competing firms, including banks and insurance companies, are necessary to avert a serious shortage. Nor do petitioners cite any indication in the legislative history that Congress believed that there was such a shortage or intended to permit bank/nonbank interlocks for this reason. To the contrary, petitioners' premise is flatly inconsistent with the judgment of Congress, which, in enacting Section 8, rejected predictions that prohibiting interlocks between competing corporations, including banks, would damage the economy.[16] As the House Judiciary Committee Report on the Clayton Act states:

> The idea that there are only a few men in any of our great corporations and industries who are

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[15] As the court of appeals observed (Pet. App. 33a-34a), former Federal Reserve Board Chairman Arthur Burns, whose views were cited by the district court to support its "public policy" argument against prohibiting interlocking directorates between large banks and competing nonbanks (Pet. App. 77a-79a), testified before a congressional committee that interlocking relationships between corporations that compete for the public's funds involve a risk of abuse that outweighs any reasonable expectation of benefits.

[16] See, *e.g.*, H.R. Rep. No. 627, 63d Cong., 2d Sess. 9 (1914) (minority views of Rep. Graham); 51 Cong. Rec. 14538 (1914) (remarks of Senator Lippitt).

> capable of handling the affairs of the same is contrary to the spirit of our institutions.

H.R. Rep. No. 627, 63d Cong., 2d Sess. 19 (1914).

There is, in short, no substantial practical need for immediate review of the issue of first impression presented in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 81-1487

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BANKAMERICA CORPORATION, *et al.*,

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v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF AUTHORITIES

STATUTES:

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Note: The list of the parties' corporate affiliates required by Rule 28.1 of the Rules of the Supreme Court appears at Pet. App. 91a-93a.

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PETITIONERS' REPLY BRIEF

I.

The Government urges that the decision below does not deserve to be reviewed because it correctly resolved a very simple case on the merits. We commend to the Court the several lengthy opinions below. They are the best answer to the case that the Government thus advances for denying certiorari.

The Government does not deny that the question presented is important in the administration of the antitrust laws. Instead it states and argues at length that "[t]he decision of the court of appeals is correct." (Br. in Opp. 6.) It adds, as a makeweight, that the decision "does not conflict with any decision of this Court or any other court of appeals" (*id.*), an unremarkable proposition given the fact that the issue is one of first impression, as the Government elsewhere notes (*id.* at 22).

The Government's position is that the case is so simple on the merits that it does not justify this Court's consideration. It takes this position despite the long time understanding (from 1914 until at least 1975) that Section 8 of the Clayton Act reached only those bank interlocks specifically dealt with in the first three paragraphs of the section and despite the even division of opinion below on the question whether that common understanding was correct.

The Government speaks of the "plain meaning" of the statute, which is said not to "warrant the restrictive interpretation" that petitioners are asserted to propose. The Government goes so far as to state that petitioners' interpretation amounts to "fashioning a loophole" in a statutory scheme whose plain import is unmistakable.

However, that was not the conclusion of the court of appeals majority. Judge Browning, speaking for himself and Senior District Judge Christensen, was able to say only that the meaning of Section 8 is "equivocal" (Pet. App. 8a), that "the applicability of the competing corporations paragraph of Section 8 to interlocking directorates between competing banks and non-banks was not clearly addressed by Congress" (*id.* at 11a), that the references in the legislative history "are in themselves ambiguous" (*id.*), and that "[n]othing in the plethora of materials relied upon by appellees or by the government resolves the ambiguity as to whether the competing corporations provision covers interlocking director[ates] between large competing banks and non-bank corporations" (*id.* at 33a).

In contrast to the panel majority's reading of the statute both the district court and dissenting Circuit Judge Kennedy found the language of the statute unambiguous — but unambiguous in favor of the reading urged by *defendants*. Chief Judge Peckham in the district court found that a "normal reading of the statutory language 'two . . . corporations . . . other than banks' compels the conclusion that the statute applies only to two corporations, neither of which is a bank." (*Id.* at 56a.) He also determined that "an ordinary reading of the statutory prohibition . . . means that banks were not to be subject to this prohibition." (*Id.*) Judge Kennedy, seconding Judge Peckham's views in his dissent in the court of appeals, said that, "had Congress intended the exemption to cover only pure bank interlocks, it would have used much different language to do so." (*Id.* at 49a.)

If, then, the words of the fourth paragraph of Section 8 convey a "plain meaning" — and petitioners believe that they do — the meaning is, as Judge Peckham put it, that "banks were not to be subject to" the prohibition of that paragraph. To sustain the contrary interpretation of Section 8, the Government must overcome that "plain meaning." The Government surely overstates when it says, without citing any passage in the court of appeals' opinion, that the "court of appeals concluded [that] the most natural reading of" the fourth paragraph is that it applies unless both interlocked corporations are banks. (Br. in Opp. 7.) The judges of the court of appeals majority did not profess to base their position on the "plain meaning" or "the most natural reading" of the statute. They based it on their resolution of what they considered an ambiguity in the statute, an ambiguity that by their acknowledgement persisted even after they had canvassed all the materials pertinent to interpretation of the statute.

We submit that at the very least the questions whether there is any such ambiguity and how it should be resolved are substantial questions that deserve this Court's consideration, in the light of the conflict of opinion below.

II.

The majority of the court of appeals resolved the ambiguity they perceived in favor of the Government's latter-day reading because of what the judges thought was the over-arching policy and purpose of the Clayton Act and Section 8. The Government's brief in opposition to the petition echoes the claims of a general congressional purpose that should prevail over the precise language of the "other than" clause taken at face value. (Br. in Opp. 9-12.) None of the very general expressions of purpose that are relied on, either by the majority below or by the Government, is even claimed to reach the particular issue posed in this case.

Judge Kennedy, dissenting below, made the classically apt response to the indiscriminate invocation of a vague and general congressional purpose as a guide to the meaning of particular statutory words. "No doubt," he wrote in his dissenting opinion, "the purpose of the statute is of principal importance in ascertaining the scope of

ambiguous terms, but the broad and simple formulation of a purpose to promote competition is insufficient to resolve a case which turns upon words and concepts that are much more precise." (Pet. App. 49a.) Moreover, whatever might be the overall purpose of Section 8, Judge Kennedy correctly observed that "[t]he purpose of the statutory exemption [in the 'other than' clause] obviously was to narrow the range of its coverage." Judge Kennedy also said that "[t]he majority's strained efforts . . . serve only to highlight and underscore the existence of a legislative intent to compromise and to narrow the statutory coverage, the v[e]ry opposite of the premise ascribed to Congress, which is the sole basis for the majority's opinion." (*Id.* at 49a-50a.)

Confirming Judge Kennedy's criticism of the majority's improper reliance on its broad perception of statutory purpose is the fact that Section 8 plainly leaves significant categories of interlocks wholly unregulated. Thus, the fourth paragraph does not prohibit an *officer* of one company from serving as a *director* of any competing company.

Likewise, the banking provisions of Section 8 (the first three paragraphs) permit significant director interlocks among banks. The banking provisions are not applicable unless one of the interlocked companies is a member bank of the Federal Reserve.[1] Even as to Federal Reserve member banks, the banking provisions of Section 8 do not apply to any interlocks with (1) federal savings and loan banks, (2) federal intermediate credit banks, (3) federal home loan banks, (4) mutual savings banks, (5) credit unions, or (6) foreign banking corporations.[2] The majority opinion has the anomalous result that

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[1] Barely one-third of the banks in the United States are members of the Federal Reserve System. In 1978, there were 15,206 total banks in the United States, FDIC, Operating Banking Offices, at (v) (1978), of which only 5,564 or 38% were members of the Federal Reserve System. Federal Reserve Board Annual Report, at 418, Table 19 (1978).

[2] These interlocks left unregulated by Section 8 have been enumerated by the Federal Reserve Board. 35 F.R. 6644 (April 25, 1970). It was not until 1978 that Congress responded to the Clayton Act's highly selective coverage of interlocks among financial institutions by enacting the comprehensive Depository Management Official Interlocks Act, 12 U.S.C. §§ 3201 *et seq.*

bank/non-bank competitive interlocks are subject to a blanket prohibition while comparable bank/bank interlocks are not.

III.

When the interpreter of the fourth paragraph of Section 8 departs from the plain meaning of its words in pursuit of a general congressional policy or purpose (which would be best served by reading the "other than" clause altogether out of the statute), he not unexpectedly runs into logical problems of construction that, we submit, cannot be surmounted.

The court of appeals majority threw up their hands when they confronted such a problem and made no effort to resolve it. The Government ignores the problem except perhaps in one footnote that, if intended to be relevant to the issues here, is highly misleading.

The logical problem in construction arises from the fact that "banks, banking associations, [and] trust companies" do not stand alone in the "other than" clause of the fourth paragraph. Also named in the clause are "common carriers subject to" the Interstate Commerce Act.

Both the Government and the court of appeals urge that "two corporations . . . other than banks" should be construed to mean "two corporations . . . *one* of which is other than a bank." They find support for such a strained interpretation in the theory that Congress meant only to except horizontal interlocks between two banks because those interlocks are specifically dealt with in the first three paragraphs of Section 8. (Br. in Opp. 7-8; Pet. App. 8a-9a.) That theory does not and cannot explain the presence of "common carriers" in the same "other than" clause. Section 10 of the Clayton Act, enacted at the same time as Section 8 and included in Section 8 in one of the House bills, deals only with vertical director interlocks involving common carriers and their suppliers, and it does not forbid any horizontal interlocks between two common carriers. None of the vertical interlocks dealt with in Section 10 would be covered by Section 8 even if there were no requirement that the two interlocked corporations must be "other than . . . common carriers." If the only interlocks involving common carriers excepted by the "other than"

clause from the general prohibition of the fourth paragraph of Section 8 were interlocks between two carriers, it could not be because such horizontal interlocks were dealt with elsewhere in the Clayton Act.

Judge Peckham looked at this feature of the statute and said that it "suggests that Congress, having regulated banks in the first three paragraphs of section 8, and having regulated common carriers in section 10, wished to make clear that these classes of corporations were not to be regulated at all in paragraph 4 of section 8." (Pet. App. 64a-65a.) "Indeed," he went on, "this is the only interpretation that provides a consistent explanation of the 'other than banks and common carrier' language that Congress utilized in section 8." (*Id.* at 65a.)

Confronting the same feature of the statute, Judge Browning for the court of appeals majority made the astonishing comment that "[t]here is no basis for the assumption that ['banks' and 'common carriers' as used in the 'other than' clause of Section 8] . . . are to be read in the same way." (*Id.* at 24a.) In other words, he was willing to accept the incongruous proposition that the clause "two corporations . . . other than banks" means that only *one* corporation need be other than a bank, whereas "two corporations . . . other than common carriers" means that *both* corporations must be other than a common carrier. That is not the serious effort to reconcile all the terms of a statute — to provide a "consistent explanation" of it, in Judge Peckham's phrase — that we have a right to expect from courts charged with finding the congressional meaning.

The Government does not squarely confront this difficulty with its chosen interpretation of Section 8. It makes one puzzling footnote reference to Section 20a(12) of the Interstate Commerce Act added by the Transportation Act of 1920, which does regulate horizontal interlocks between common carriers (Br. in Opp. 8, n.5.) It suggests that the reference is relevant — introducing the reference with the phrase, "It is instructive in this regard . . . ." — but without explaining how. The lack of explanation is thoroughly understandable. No explanation would do. Section 20a(12), enacted in 1920, is not the slightest bit instructive in any relevant regard unless

one assumes that the Congress of 1914 anticipated what another Congress was going to do six years later.

IV.

The Government attempts to minimize the immediate practical consequences of the decision below.

First, it questions its own estimate, which was quoted by defense counsel below without question, that 40 percent of the directors of insurance companies also serve as the directors of banks. (Br. in Opp. 18, n.12.) It also tries to cast doubt on the survey of some of the members of the American Council of Life Insurance, which indicated that roughly 50 percent of their directors are also directors of banks. (*Id.*) That survey would seem to verify the Government's own prior estimate. In any event, the percentage could be much smaller, and the problem would still be a serious one. How many of the interlocks involve companies that actually compete is, of course, not known, as the Government says. But, given the mobility of capital funds, the likelihood is strong that there would at least be a substantial question of the existence of competition in most of the interlocks.

Second, the Government notes that the decision below is the law only of the Ninth Circuit. (Br. in Opp. 19.) But, in saying that, the Government does not take account of either (1) the size and importance of California and some of the other states in the Ninth Circuit — how many banks and insurance companies headquartered and doing substantial business elsewhere, such as petitioners, are subject to the law of that circuit — or (2) the fact that the case was watched closely by the entire financial community throughout the country, which knew it to be a test case. The Government offers to directors in other circuits only the unappetizing prospect of continuing to sit and awaiting Government suits, which would be well publicized, challenging the legality of their doing so.

That is not how Section 8 has been enforced. When counsel know what its strictures mean, it is self-enforcing. Now that the Government has itself mooted the issue of what the "other than" clause of Section 8 means, counsel will not be able to give authoritative advice until this Court speaks authoritatively. Historically, antitrust has been

recognized as an area where the decision of this Court is essential to give meaning to sweeping statutory generalities and to resolve ambiguities. There is every reason to take this test case as the occasion for speaking authoritatively on an important question of antitrust law that the court below acknowledged was decided on the basis of resolving a perceived ambiguity. The Government has offered no good reason for waiting.

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Amicus Brief

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IN THE

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OCTOBER TERM, 1981

THE CROCKER NATIONAL CORPORATION and
BANKAMERICA CORPORATION, et al.
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of American Council of Life Insurance as Amicus Curiae in Support of the Petition

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QUESTION PRESENTED

Whether an interlocking of directors between a bank and an insurance company is prohibited by Section 8 of the Clayton Act which prohibits director interlocks between "two . . . corporations . . . other than banks."

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Brief of American Council of Life Insurance as Amicus Curiae in Support of the Petition

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This brief is filed on behalf of the American Council of Life Insurance, with the consent of all the parties and in support of the petition for certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 656 F.2d 428. A copy of the opinion is reproduced in the Appendix to the Petition. The opinion of the United States District Court for the Northern District of California is reported at 422 F. Supp. 686; it is set forth in the Appendix to the Petition.

JURISDICTION

As shown in the Appendix to the Petition, the judgment below was entered on September 14, 1981, and a petition for rehearing was denied on November 10, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 8 of the Clayton Act is set forth in its entirety in the Appendix to the Petition. In pertinent part, Section 8 provides:

> No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virture of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

INTEREST OF THE AMICUS

The American Council of Life Insurance is a nonprofit trade association representing the interests of 526 member life insurance companies. Virtually every member company of the Council has at least one director who is also a director of a bank. If simultaneous service on bank and insurance company boards is to become a forbidden practice, it is clear that a major overhaul of existing insurance company boards will be necessary, and the impact on the governance of those companies will be dramatic. The interest of the American Council of Life Insurance is thus clear and immediate.

The district court found that forty percent of all insurance company directors were also directors of banks as of the time of trial, 422 F. Supp. at 691; a senate staff study conducted in 1980 shows the continuing prevalence of such interlocks;[1] and our own recent survey of some of the major life insurance companies which are members of the Council shows roughly fifty percent of their directors are also directors of banks. Neither the existence nor the extent of the practice are recent developments. Member company records show simultaneous service before and after the Clayton Act without interruption. Public data from companies selected at random are available to confirm the early date and steady continuity of the practice:

Insurance Companies	1928		1950		1970	
	Total Directors	"Bank" Directors	Total Directors	"Bank" Directors	Total Directors	"Bank" Directors
John Hancock Mutual Life Insurance Company.....	16	7	19	7	22	11
Metropolitan Life Insurance Company.....	24	9	25	15	28	18
New England Mutual Life Insurance Company.....	10	3	12	5	14	6
New York Life Insurance Company.....	25	14	22	8	24	9
Northwestern Mutual Life Insurance Company.....	31	16	36	19	36	12

Source:
Standard & Poor's Register of Directors & Executives;
Moody's Bank & Finance Manual.

1928 is the first year of publication for both the Poor's Register of Directors of the United States and Moody's Bank & Finance Manual. The figures indicating the number of directors also serving on bank boards include only insurance/bank interlocks. Savings and loan associations and trust companies are not included.

[1] "Institutional Shareholders and Interlocking Directorates Among Major U.S. Corporations," Staff Study prepared by the Senate Committee on Governmental Affairs (96th Cong., 2d. Sess., December 1980).

The numbers and percentages are large, and they understate the impact. On insurance boards, interests and responsibilities may be specialized among the members of a board, who are often organized into committees to allow proper attention to the wide range of matters which are properly the subject of a board's attention.[2]

Particular directors, and particularly groups of directors, are not likely to be fungible: the need to replace even a third or a quarter of the board may well be a need to replace all of its expertise and experience in one or more areas of concern. For example, in our survey of some of the major life insurance companies, the need to replace roughly fifty percent of their directors would result in a need to replace a greater percentage of the directors on important board committees—as much as eighty percent on the committees of some companies, *e.g.*, the audit committees.

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[2] The role of committees of the board in the insurance context has been explained by Stephen R. Middlebrook of Aetna Life & Casualty in the following way:

> As businesses become increasingly complex, many corporate boards have found the use of a committee system not only to be a necessary response to pressures for improved corporate governance, but also a necessary process to deal with the increasing flow of information they receive. Insurance companies, for example, have long used the device of a separate "finance" or "investment" committee to deal with the special body of information that directors must review prior to approving investments or delegating investment authority. In more recent years, those companies along with others have developed audit committees to provide an environment more conducive to understanding complex financial statements: compensation committees to evaluate and reward management performance (and consider lines of management succession): and corporate social responsibility committees to allow time for more thoughtful attention to that emerging corporate role. In response to the increased use of the committee system, many corporate laws now provide specifically that board members may rely on information and reports furnished them by such committees in making important business decisions. ("The Role of the Outside Director," 1978 Proc. Legal Sec. Am. Council of Life Ins. 15, 34-35)

The Council and its members are concerned about the legal status of current boards and directors, about the continued smooth functioning of those boards, and about the pool of individuals able to provide the financial expertise that insurance boards need and will continue to need, and ultimately about the effective and wise management of these companies.

STATEMENT

This case was brought by the Department of Justice for the purpose of broadening the previously understood limits of Section 8 of the Clayton Act, 15 U.S.C. § 19, governing interlocking directorates.[3] In the trial court and the appellate court below the Justice Department attempted to establish, despite the wording of the section which prohibits service on the boards of two or more competing corporations "other than banks," that service on the boards of a bank and a non-bank corporation that competes with the bank is also proscribed.[4] Extensive factual stipulations entered into in the district court removed considerations based on the peculiar circumstances of the defendants and presented the legal issue in clear and general terms. *United States v. Crocker Nat. Corp.*, 422 F. Supp. 686, 688 (N.D. Cal. 1976).

Based upon the structure and wording of the statute,[5] the legislative history of its enactment, the contemporaneous understanding of its scope, and the consistent and long-continued

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[3] "[T]hese instant cases represent the first time, since Section 8 was enacted over 60 years ago, that the Justice Department has attacked a bank/nonbank interlock of the type now being challenged." *United States v. Crocker Nat. Corp.*, 422 F. Supp. 686, 691 (N.D. Cal. 1976).

[4] In attacking the "bank interlocks" the government has taken the position that the language "no person . . . shall be a director in any two or more corporations, . . . other than banks" requires that both corporations, not just one, be banks in order to be excluded from Section 8. 422 F. Supp. 686, 689. The government contends that the "other than banks" clause refers to other parts of Section 8 where banks are regulated. *Id.*

[5] The district court concluded that "an ordinary reading of the statutory prohibition '[n]o person . . . shall [serve as] a director in any two or more corporations . . . other than banks' means that banks were not to be subject to this prohibition." 422 F. Supp. at 690.

pattern of administrative and practical interpretation based on this understanding, the district court decided that Section 8 does not apply to simultaneous service on the boards of banks and non-bank corporations which, to some extent, compete with banks. It said, in support of its decision, that "[m]ore than 60 years of administrative interpretation and Congressional action" confirmed the conclusion that "banks were not to be subject to this prohibition." 422 F. Supp. at 690.

The court of appeals reversed in a two to one decision, with Judge Kennedy dissenting. Finding the language of the exclusion "ambiguous," the majority opinion turned to its perception of the broad purpose of Section 8. The general purpose of the Clayton Act, to supplement the Sherman Act in strengthening and fostering competition, was emphasized, and the court noted in particular the strength of the congressional animus toward interlocking directorates among competitors demonstrated in the *per se* prohibition embodied in Section 8. Relying on the language in *FTC v. Fred Myer, Inc.*, 390 U.S. 341, 349, that an "unmistakeable directive" is required to construe an antitrust statute "counter to the broad goals" of maximum competition (*citing United States v. Philadelphia National Bank*, 374 U.S. 321, 348; *see also Group Life & Health Insurance Co. v. Royal Drug, Co.*, 440 U.S. 205, 231), and approaching the interpretation of the "other than banks" language as a question of implied immunity from the antitrust laws, the court of appeals found that the broad policies of the Clayton Act required sanction of bank/non-bank interlocks. In so doing, the panel below rejected more than 60 years of consistent administrative and congressional understanding and practice found by the district court, saying that it was of little force" in light of a (subsequently vacated) opinion of the Federal Trade Commission filed in 1977 and based on Section 5 of the Federal Trade Commission Act. *In re Perpetual Federal Savings & Loan Ass'n*, 90 F.T.C. 608 (1977), *vacated on other grounds*, 94 F.T.C. 401 (1979).

SUMMARY OF ARGUMENT

The issue in this case provides in striking fashion the elements of practical significance, legal novelty, and factual

simplicity which make resolution of the issue by this Court appropriate.

1. Both courts below faced and decided on an uncontroverted record an issue not previously raised in court: the application of Section 8 to bank/non-bank interlocks. It is an issue of basic significance to the nation's insurance companies which must decide whether to recast their boards of directors in radical fashion if the decision below is not reversed. In these circumstances the minatory impact of the decision below extends beyond the particular parties and beyond the confines of the Ninth Circuit. Only an authoritative resolution by this Court can provide the necessary guidance to the national insurance community. *See Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659; *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213; *Securities and Exchange Commission v. Capital Gains Research Bureau*, 375 U.S. 180.

2. The practice involved—simultaneous service on bank and insurance company boards—has continued to exist in reliance on the contemporaneous and unbroken interpretation of Section 8: that the Section applies only to " 'corporations engaged in commerce which are neither banks, banking associations, trust companies nor common carriers.' " 422 F. Supp. at 690, *quoting* the 1950 Report on Interlocking Directorates of the Federal Trade Commission. The government is attempting to overturn and ignore the contemporary and long-standing interpretation of the statute, and frustrate the private interests built up in reliance on it; this effort should be scrutinized in the same way as previous similar executive branch efforts to expand their statutory authority beyond its historical limits. *See, e.g., United States v. Clark*, S. Ct. No. 80-1121, slip. op. at 10 (Jan. 12, 1982); *Bryant v. Yellen*, 447 U.S. 352, 366 n.16, 377; *National Labor Relations Board v. Bell Aerospace Co.*, 416 U.S. 267; *see also Zenith Radio Corp. v. United States*, 437 U.S. 443; *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513-14.

3. In rejecting the direct evidence of legislative intent and contemporaneous interpretation in favor of its own formulation of the broad purpose of the statute, the court below mis-

apprehended the decisions of this Court and the proper limits of judicial interpretation of statutes. All of the cases upon which the court below relied started from the statute itself—its language, history, and circumstances of promulgation—to reason through to the result. *See United States v. Philadelphia National Bank,* 374 U.S. 321; *United States v. E.I. du Pont de Nemours and Co.,* 353 U.S. 586; *United States v. South-Eastern Underwriters,* 322 U.S. 533. The court below reverses this process: it starts with its own general gloss on the broad purpose of the statute and uses it to battle upstream against the logical flow of language, legislative history, and administrative interpretation. Proper interpretation of Section 8, and proper guidance on judicial restraint in statutory interpretation, require review and reversal of this tour-de-force.

REASONS FOR GRANTING THE WRIT

1. The decision below presents a statutory issue of first impression and great practical importance; in the absence of an authoritative decision by this Court the status and functioning of virtually every insurance company board of directors will be thrown into doubt.

The courts below agreed on two items of substance. First, the prosecution of the suit below was unprecedented in the 60 year history of the Clayton Act. Second, 40% of the insurance company directors in the United States were, as of the date of trial, also directors of banks. The disregard by the court below of the contemporaneous and long-continued history of the banking exemption from Section 8, and of the explicit language of the section, will cast doubt on the composition and hamper the functioning of the boards of directors of virtually every insurance company in the country.[6] These boards were formed in reliance on the prior interpretation of Section 8, but will continue to function, in all other circuits, only at their own peril

[6] As of December 31, 1979 there were 1,890 life insurance companies with assets totaling 432.3 billion dollars in the United States. U.S. Bureau of the Census, Dept. of Commerce, Statistical Abstract of the United States 548,550 (101st ed. 1980).

and that of the individual directors until this Court decides the question at issue.

Thus, although the decision below was rendered by a single divided panel of the Ninth Circuit, its impact will be national in scope. The Justice Department has great latitude in deciding where to bring a Section 8 enforcement action,[7] and it is likely to seek the now congenial confines of the Ninth Circuit. Moreover, even those corporations and directors who could not be reached in the Ninth Circuit because of the absence of residence or business there must plan with the precedent below in mind, and must justify to stockholders any decision which would seem to run afoul of it. In the absence of review by this Court, the decision of the court below, reached on the basis of an expansive approach to statutory construction, will have—as the Justice Department intended—a national, if not conclusive, impact, unsettling the issues and interests presented here.

The statutory importance of the issue, the unprecedented nature of the prosecution, and inevitable impact of the lower court decision on planning and actions of the financial community constitute a compelling case for granting the writ of certiorari, making this case similar to others in which certiorari has been granted. *See, e.g., SEC v. Capital Gains Research Bureau,* 375 U.S. 180 (although no other lower court had decided the issue presented in *Capital Gains,* this Court "granted certiorari to consider the question of statutory construction because of its importance to the investing public and the financial community." 375 U.S. at 185). Where the issue is the application of the antitrust laws to a widespread and important aspect of corporate activity, the case for authoritative review is even stronger. *See Gordon v. New York Stock Exchange, Inc.,* 422 U.S. 659 (affirming lower court's construction of the

[7] Venue in antitrust actions is generally governed by 15 U.S.C. §§ 15, 22, which allow suit in the district where the defendant resides, is an inhabitant, is found, has an agent, or transacts business. These statutes are not exclusive, however; they supplement the general venue statute in 28 U.S.C. § 1391. Read together these statutes lay venue in a judicial district if a defendant resides, is found, or does business in that district or if the claim arose in that district. *See Ohio-Sealy Mattress Mfg. Co. v. Kaplan,* 429 F. Supp. 139, 141 (N.D.Ill. 1977).

Sherman Act that fixed commission rates set by the securities exchanges and used by stock brokers were immunized from antitrust laws); *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213 (certiorari granted to determine whether Shipping Act precludes application of the antitrust laws to the shipping industry); *see also Case-Swayne Co., Inc. v. Sunkist Growers, Inc.,* 389 U.S. 384 (certiorari granted to determine the scope of the Capper-Volstead Act exemption under the antitrust laws). In both *Gordon* and *Capital Gains,* as here, the issue was whether a widespread practice in the financial community was proscribed by federal law; and in both, as here, there was a need for authoritative resolution to allow the law-abiding to discern their obligations without difficulty and to perform every-day functions without fear of prosecution.

Enforcement of Section 8 depends upon clear understanding and spontaneous compliance rather than upon the *in terrorem* effect of broad administrative authority. By way of illustration, Section 8 may be distinguished from Section 5 of the Federal Trade Commission Act, a residual clause designed to proscribe anticompetitive activity which might otherwise escape the scope of the more specific provisions of the statute. *Compare Federal Trade Commission v. Texaco, Inc.,* 393 U.S. 223. The banks and insurance companies should have clear direction if they must now, after more than two-thirds of a century, reconstitute their boards of directors.

2. Authoritative review by this Court is necessary where a lower court has disregarded the contemporaneous and longstanding interpretation of a statute and frustrated the substantial private interests built up in reliance upon it.

Disregarding "60 years of consistent administrative interpretation and congressional action,"[8] the court below so

[8] In its 1950 Report on Interlocking Directorates the Federal Trade Commission described the scope of Section 8 as governing ". . . corporations engaged in commerce which are neither banks, banking associations, trust companies nor common carriers . . ." 422 F. Supp. at 690. Several staff

(footnote continues)

changed the scope of Section 8, and so frustrated the proper reliance of the banking and insurance communities, that review by this Court is necessary to establish and clarify the bounds of the law.

It has been the consistent and salutary practice of this Court to give great weight to contemporaneous and long-continued statutory interpretations[9] and to scrutinize with extreme care any assertion—by the government or a private party—that such an interpretation should be upset. *See, e.g., United States v. Clark,* S.Ct. No. 80-1121, slip op. at 10 (Jan. 12, 1982); *Bryant v. Yellen,* 447 U.S. 352, 366 n.16, 377. The case for review, and the case for upholding the contemporaneous construction, is even stronger when substantial private interests have been built up in reliance upon that construction. *Bryant v. Yellen, supra.*

In *Zenith Radio Corp. v. United States,* 437 U.S. 443, 450, this Court provided a clear statement of the principle in sustaining the contemporaneous administrative interpretation of the statutory provisions defining "countervailing duty":

> An administrative "practice has peculiar weight when it involves a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, of making

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(footnote continued)

reports submitted by Congressional bodies with antitrust and banking responsibility concluded that Section 8 had no application to bank/non-bank interlocks. 422 F. Supp. 691. New section 8A, enacted in 1933, would have reached the bank interlocks challenged here, but it was repealed on August 23, 1935 with the intention of eliminating the prohibition against interlocking directorates among banks and institutions with which they competed in making loans. 422 F. Supp. 691-92. Other more recent attempts to amend Section 8 which would have prohibited director interlocks of the type challenged here, have all died in committee. *See* 422 F. Supp. 692.

[9] This principle may be traced back at least as far as *Edward's Lessee v. Darby,* 12 Wheat. 206, 210 (1827): "In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." *See also United States v. Hill,* 120 U.S. 169, 182 (1887).

> the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933); *see, e.g., Power Reactor Co. v. Electricians*, 367 U.S. 396, 408 (1961).

In the *Zenith* case, the Court stressed that (437 U.S. at 457-58):

> foreign tax systems as well as private expectations thus have been built on the assumption that countervailing duties would not be imposed on nonexcessive remissions of indirect taxes. In light of these substantial reliance interests, the longstanding administrative construction of the statute should "not be disturbed except for cogent reasons." *McLaren v. Fleischer*, 256 U.S. 477, 481 (1921); *see Udall v. Tallman*, 380 U.S. at 18.[10]

Here, the Justice Department, unlike the Secretary of the Treasury in *Zenith*, seeks to escape from rather than uphold its contemporaneous and longstanding interpretation of the Act. But the initial construction of the Act and the significant impact on reliance interests should be equally compelling here.

In *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, this Court rejected the NLRB's attempt to narrow the scope of the exception for "managerial employees" for whom involvement in a labor organization might give rise to a conflict of interest. 416 U.S. at 272. The Court stressed that "[f]ollowing the passage of the Taft-Hartley Act, the Board itself adhered to the view that 'managerial employees' were outside the Act" (416 U.S. at 285), and noted the "far reaching" implications of the change in scope urged by the Board (416 U.S. at 289 n.18). The Court rejected the Board's change of position, and af-

[10] The petitioner had contended in *Zenith* that the Court's interpretation created a "loophole" for remission of indirect taxes and relied on the evolution of "modern economic theory" to establish that the remission of indirect taxes is an unfair subsidy which the countervailing duty rules should reach. The *Zenith* Court left to Congress the closing of old statutory "loopholes" and the promulgation of new statutory theories.

firmed the conclusion that managerial employees as such were beyond the scope of the Act. The greater persuasive force of an initial contemporaneous interpretation of a statute's scope is likewise demonstrated in numerous other cases in which this Court preferred the initial interpretation to a subsequent change of position by the agency. *See, e.g., Bryant v. Yellen, supra* (where the Secretary of the Interior attempted to repudiate in 1964 a construction of the Boulder Canyon Project Act which had been consistently adhered to since its passage in 1929); *Southeastern Community College v. Davis,* 442 U.S. 397, 411-12 n.11; *General Electric Co. v. Gilbert,* 429 U.S. 125, 142-43, and cases there cited.[11]

The court below accepted the Government's assertion—based upon *United States v. Philadelphia National Bank,* 374 U.S. 321; *United States v. E. du Pont de Nemours and Co.,* 353 U.S. 586; and *United States v. South-Eastern Underwriters Association,* 322 U.S. 533—that the reach of an antitrust statute is not necessarily limited to the view of its bounds current at the time of its passage, and that failure to prosecute in the past does not necessarily bind the Government in the future. 656 F.2d 441, 449. It is, however, uncontested that no other prosecutions based on the Government's theory have been brought in the entire history of the Act. Here, as in *Federal Power Commission v. Panhandle Eastern Pipe Line Co.,* 337 U.S. 498, 513-14, "[f]ailure to use such an important power for so long a time indicates" the Government did not believe the power existed. *See* Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L. Rev. 527, 543 (1947). "More than sixty years" of acquiescence in a widespread and highly public practice—which, by the government's theory, has always been illegal—is neither "equivocal" evidence of the government's

[11] *See, also, United States v. Sisson,* 399 U.S. 267, where this Court relied on "the interpretation placed on the [Criminal Appeals] Act shortly after its passage that has been consistently followed for more than 60 years by the Government" (399 U.S. at 307) (plurality opinion by Justice Harlan).

contemporaneous understanding nor is it dispelled by FTC dicta on the subject rendered in 1977.[12] The approach of the panel below has the effect not only of scrambling the management structure of banks and insurance companies all over the country, but also of encouraging officers of the executive branch to extend their statutory authority in other cases and on other questions.

Where the issue is whether a longstanding view of a statute is to be abandoned, and where a particular lower court decision is likely to have a substantial and potentially conclusive impact on persons and interests far beyond those represented in the proceeding below, this Court has consistently granted certiorari, or, in cases on appeal, noted probable jurisdiction, and resolved the issue. Such cases include *Gilbert, Southeastern Community College v. Davis, Bell* as well as *Gordon* and the antitrust cases. *See also Morton v. Ruiz,* 415 U.S. 199, 201-02 (certiorari granted "because of the significance of the issue and because of the vigorous assertion that the judgment of the Court of Appeals was inconsistent with the long-established policy of the Secretary [of the Interior] and Bureau [of Indian Affairs]"); *Patterson v. Lamb,* 329 U.S. 539, 541 (certiorari granted to review decision of the court of appeals which upset twenty-five years of important War Department rulings and practices and affected the status and claims of thousands of draftees).

The conflict between the history of Section 8 and the interpretation of the court below can only be resolved by this Court, and it should be resolved with proper deference to both contemporaneous interpretation and long-standing private re-

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[12] The Federal Trade Commission in *In re Perpetual Federal Savings & Loan Assoc.*, 90 F.T.C. 608 (1977), *vacated on other grounds*, 94 F.T.C. 401 (1979) filed a complaint alleging that simultaneous board membership between a director of a bank and a savings and loan association was an unfair trade practice in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Relying on its perception of a general antipathy toward horizontal interlocking directorates emerging from the federal anti-interlock statutes and invoking its broad power to regulate practices which conflict with the basic policies of the Sherman and Clayton Acts, the Commission concluded (one Commissioner dissenting) that bank/savings and loan association interlocks violated the policy, if not the letter, of Section 8 of the Clayton Act and thus constituted an unfair trade practice. *Id.* at 656.

liance. *See Bate Refrigerating Co. v. Sulzberger,* 157 U.S. 1;[13] Griswold, *A Summary of the Regulations Problem,* 54 Harv. L. Rev. 398, 404-11 (1941).

3. The court below improperly applied and relied upon the decisions of this Court in using the broad purpose of the antitrust laws as grounds for rejecting the specific language, and legislative and administrative history of Section 8 of the Clayton Act.

The court of appeals found the language of the statute "equivocal" and "unclear" and the legislative materials "ambiguous," 656 F.2d 434-35, but felt free to hypothesize the motivations of the Senate and House, 656 F.2d 442, the bargains which resulted in the specific configuration of the statute, 656 F.2d 441-42, the differing degrees of congressional antipathy to carrier as opposed to bank interlocks, 656 F.2d 442-43, and to speculate that some members of the enacting Congress may have believed either that banks were not engaged in commerce and their interlocks could not be reached, or that banks were not competitors of other corporations and thus were beyond the scope of the section. 656 F.2d 444. The court below apparently found the general purpose of the statute (the "less direct evidence" of intent in its own formulation) so "unmistakable" that all more direct evidence—hearings, reports, debate by proponents and opponents, administrative interpretation and practice etc.[14] could be explained away. *See* 656 F.2d 435, 440, 447.

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[13] As noted in *Bate,* 157 U.S. at 34, " . . . if there be reasonable ground for adopting either one of two constructions; this court, without departing from sound principle, may well adopt that construction which is in harmony with the settled practice of the executive branch of government, and with the course of judicial decisions in the Circuit Courts of the United States; especially if there be reason to suppose that vast interests may have grown up under that practice and under judicial decisions, which may be disturbed or destroyed by the announcement of a different rule."

[14] During the hearings held on the initial Clayton Bill, Mr. Untermeyer, counsel for the Pujo Committee, remarked that a director interlock between a life insurance company and a bank had failed to be included in the bill. 422 F. Supp. 695. The House Report accompanying H.R. 15657 (the bill that was

(footnote continues)

This is not a case where the Court is called upon to repair to a broad policy to reject an "implied" exemption (e.g., *South-Eastern Underwriters, Philadelphia National Bank, Dupont*) or to supply a legislative omission (e.g., *Fred Myer*). Here, the specific treatment of bank interlocks by Section 8 makes the issue more concrete and less amorphous. Because the language prohibiting interlocks among corporations "other than banks" is explicit, the government is put in the position of asking this Court to imply statutory coverage and enforcement authority,[15] and the arguments supporting the attempt distort both the legislative history and this Court's precedent.

There is no contention here which is comparable to the perception in *South-Eastern Underwriters* that generally under the Sherman Act Congress wanted to exercise the limits of its authority under the Commerce Clause: there is no basis for a contention that Congress wanted to outlaw all interlocks, or even to outlaw interlocks to the full extent of its authority.

(footnote continued)

to become the Clayton Act), referred to the provision here in question as affecting "industrial corporations" as distinct from "banks." 422 F. Supp. 695-96. During the House debate over the "other than banks" clause added for the first time by the Conference Committee, Representative Mann agreed that what the conferees had done was to eliminate all banking corporations from this section. 422 F. Supp. 697. Congressmen Webb and Shirley also shared this view. 422 F. Supp. 699. The district court below concluded: "In short, there is not one statement by anyone in Congress that supports the Government's argument that the 'other than banks' language meant only to exclude bank/bank interlocks but not bank/nonbank interlocks." 422 F. Supp. at 700.

[15] The court of appeals below relied heavily on the doctrine that an exemption from the antitrust laws should be narrowly construed, whether the claimed exemption is expressed or implied. 656 F.2d 440-41. This general canon of construction has no force here for two reasons. The first is the explicit nature of the wording and structure of the statute. The second, is that exclusion from the coverage of Section 8 does not operate as an exemption or immunity from the substantive constraints of the statute. *Philadelphia National Bank* demonstrates the application of the substantive constraints to banks; and the exemption for insurance companies, to the extent that one exists, is contained in the McCarran-Ferguson Act. Unlike an exemption or immunity which grants the recipient the prerogative of engaging in anticompetitive conduct which would be otherwise illegal, the exclusion from Section 8 coverage does not operate to allow any anticompetitive actions. Section 8 is a preventative measure that seeks to proscribe situations which were perceived to have the potential for facilitating anticompetitive conduct. *See SCM Corporation v. Federal Trade Commission*, 565 F.2d 807, 811 (2d Cir. 1977). The literal construction of Section 8 does not grant immunity to any one from the substantive provisions of the antitrust laws.

Similarly there is no inclusive intent comparable to the perceived Congressional desire to eliminate all large buyer preferences—upon which the Court relied in *Fred Myer. See* 422 F. Supp. 701 (Section 8 does not include all corporations engaged in commerce without exception). The government's position and the opinion of the court below allow the "general purpose" of the Clayton Act to float entirely free of the words that supposedly embody it, and to contradict these words completely where they seem to be inconvenient to the perceived purpose.

The actual purpose and proper impact of Section 8 is quite different: Section 8 is a bright-line, prophylactic rule. Clarity of limits is essential to companies and potential directors who must know and adhere to its limits.[16] No new situation or circumstance has arisen here which requires reassessment of the modern form of the evils which Section 8 was designed to reach. There is no contention that Congress intended to exercise the limits of its power to outlaw interlocking directorates (*compare South-Eastern Underwriters*) nor is there any contention that the problem of bank interlocks with competitors has changed in such a way that the statute must be reinterpreted.[17] On the contrary, the statute dealt specifically with a

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[16] Under Section 8, proof that an interlock has an actual anticompetitive effect is not required. *TRW, Inc. v. FTC*, 647 F. 2d 947 (9th Cir. 1981); *accord, Protectoseal Co. v. Barancik*, 484 F.2d 585, 589 (7th Cir. 1973) (Section 8 prevents directors from serving in positions which involve a potential frustration of competition). The prophylactic purpose of Section 8 was "to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates." *SCM Corporation v. FTC*, 565 F. 2d 807, 811 (2nd Cir. 1977), *quoting, United States v. Sears, Roebuck & Co.*, 11 F. Supp. 614, 616 (S.D. N.Y. 1953).

[17] Restricting Section 8 to its historical limits does not deny any of the flexibility which may be justified where an old statute must be adapted to new conditions. As this Court recognized in *Teamsters v. Daniel*, 439 U.S. 551, 556, deference to agency interpretation of a statute is "a product both of an awareness of the practical expertise which an agency normally develops, and of a willingness to accord some measure of flexibility to such an agency as it encounters new and unforeseen problems over time." Section 8, however, is not like the Sherman Act or Section 10(b) of the Securities Exchange Act of

(footnote continues)

problem—interlocks among corporations "other than banks"—provided a limited solution, discrete exemptions, and no mechanism by which the statute could be expanded by the executive branch or by the courts.

In formulating a more inclusive general purpose than the statute actually expresses, and then using this formulation in a mechanical fashion to push aside both the explicit limitations of the statutory language and the consistent view of those limitations which prevailed prior to the institution of this suit, the court below forsook proper deference both to the enacting legislature and to the materials which allow a court to divine its intent. Justice Brandeis's words in *Iselin v. United States,* 270 U.S. 245, 251, are illuminating here: "What the Government asks is not a construction of a statute, but in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope." In endorsing the refusal of the Court in *Iselin* to do what the Government asked, Justice Frankfurter (in his much cited article "Some Reflections on the Reading of Statutes," 47 Colum. L. Rev. 527 (1947)), summed up the proper counsel of judicial restraint where the Court is asked to amend legislation to remedy the perceived failures of Congress in effecting its own intent:

> An omission at the time of enactment whether careless or calculated, cannot be judicially supplied however much later wisdom may recommend the inclusion.
>
> The vital difference between initiating policy, often involving a decided break with the past, and merely carrying out a formulated policy, indicates the relatively narrow limits within which choice is fairly open

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(footnote continued)

1934, for instance, statutes designed to pick up new forms of old evils, where precise bounds would merely reward clever evasion and defeat the deterrent effect of the law. *See, e.g., National Soc. of Professional Engineers v. United States,* 435 U.S. 679, 688; *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 748; *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 787; *Affiliated Ute Citizens of Utah v. United States,* 406 U.S. 128, 151; *Superintendent of Insurance v. Bankers Life & Casualty Co.,* 404 U.S. 6, 12.

> to courts and the extent to which interpreting law is inescapably making law.

47 Colum. L. Rev. at 534. With particular relevance to the current dispute, Justice Frankfurter went on to observe: "For judges at least it is important to remember that continuity with the past is not only a necessity but even a duty." *Id.* at 535. In failing to observe or even recognize this duty, the court below legislated an enlargement of Section 8 of the Clayton Act more than 60 years after Congress spoke, and, through this policy choice, unsettled virtually every insurance company board in the country as a result.

CONCLUSION

For all of the reasons set forth above and for the additional reasons advanced in the petition in this case, the writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BANKAMERICA CORPORATION, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION, THE CALIFORNIA BANKERS CLEARING HOUSE ASSOCIATION AND THE AMERICAN BANKERS ASSOCIATION, *AMICI CURIAE*

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STAFF OF ANTITRUST SUBCOMM. OF HOUSE COMM. ON THE JUDICIARY, 89th Cong., 1st Sess., INTERLOCKS IN CORPORATE MANAGEMENT (Comm. Print 1965) 10

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MISCELLANEOUS:

16C J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION (1981) 6, 10

IN THE

Supreme Court of the United States

October Term, 1981

No. 81-1487

BANKAMERICA CORPORATION, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION, THE CALIFORNIA BANKERS CLEARING HOUSE ASSOCIATION AND THE AMERICAN BANKERS ASSOCIATION, *AMICI CURIAE*

This brief is filed in support of the petition, pursuant to Rule 36.1 and with the consent of all parties.

Interest of *Amici Curiae*

The New York Clearing House Association is an association of twelve major commercial banks in the City of New York which clears checks and other commercial items in the New York area. The California Bankers Clearing House Association is a similar association of eight major

commercial banks in the State of California. Both associations regularly participate as *amici curiae* before appellate courts in cases raising significant legal questions relating to banking.

The American Bankers Association ("ABA") is the largest national trade association of the commercial banking industry, numbering among its members 13,000 banks (about 93% of domestic commercial banks) located in all fifty States and the District of Columbia. The ABA actively participates in litigation raising issues of concern to the commercial banking industry, both through actions instituted in its own name and as an *amicus curiae* in other cases.

All members of each of the *amici* have a strong interest in the ability of experienced directors of nonbanking corporations to serve as directors of commercial banks, subject only to limitations imposed by Congress. The decision below would sharply curtail the service of such directors on gossamer notions of "policy" never enacted into law and, indeed, rejected by Congress whenever proposed.

Statement

Since the inception of the corporate form of business organization, banks and nonbanking corporations have had common directors. This natural practice has provided important experience and perspective to the thousands of enterprises that serve society's material needs and in turn provided banks themselves with continuing knowledge of the banking needs of the communities they serve. The corporations having common directors with banks have always included other financial enterprises, such as insurance companies, and that remains the case today.

All of this Congress knew in 1914, when it enacted § 8 of the Clayton Act, 38 Stat. 732, as amended, 15 U.S.C.

§ 19 (1976), which regulates interlocking directorates. Congress dealt in the section's first two paragraphs (now combined, as amended, into the first paragraph) with bank interlocks; Congress dealt in what was then the third and is now the fourth paragraph—known as the "industrial corporations" provision—with interlocks not involving banks, but "two more corporations . . . other than banks, banking associations, trust companies and common carriers." No provision was included covering interlocks between banks and other corporations of any kind, and no such provision exists today. The quoted language of the "industrial corporations" provision has never been altered.

For sixty years, Congress, the Bar, the business community, and the antitrust enforcement authorities accepted that § 8 meant what it said and had no application to interlocking directorships between banks and other corporations.

In an extraordinary assault upon this abiding consensus, the Antitrust Division brought these test cases in 1975, charging that interlocking directorships between various of the petitioner banks and bank holding companies and various of the petitioner insurance companies violated the fourth paragraph of § 8. The parties stipulated that each of the challenged bank–insurance company interlocks was between "competitors" within the meaning of the fourth paragraph of § 8, and each side moved for summary judgment, posing directly for decision the legal question of whether that provision applied to banks.[1]

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[1] The defendants sought judgment on the bank holding company–insurance company interlocks on the ground of inapplicability and on an additional ground: It was stipulated that none of the bank holding companies was itself a "competitor" of an interlocking insurance company, and defendants contended that a holding company did not become such a "competitor" merely because its bank subsidiary was one (App. 81a-82a). ("App." citations are to the appendices to the petition for certiorari.)

The district court granted judgment to defendants, holding that "a normal reading of the statutory language 'two . . . corporations . . . other than banks' compels the conclusion that the statute applies only to two corporations, neither of which is a bank" (App. 56a).[2] The court of appeals reversed, one judge dissenting, finding the quoted language "equivocal" and holding that what it considered to be the general congressional policy underlying § 8 called for the provision in question to be treated as if it read "two or more corporations . . . *any one of which is other than a bank*" and thus to be applied to interlocks between banks and other corporations (see App. 9a, 19a, 37a).[3] Rehearing was denied (App. 90a).

Summary of Argument

This case presents a straightforward and important question of federal law which can only be settled by this Court. Further litigation in other federal circuits will not contribute to the Court's decisional process. To the contrary, prompt resolution of the question presented will spare the courts and the business community wholly unnecessary additional litigation and foster respect for the judicial process. Consequently, certiorari should be granted.

Moreover, this case does not require plenary consideration. The decision of the court of appeals is patent error since it is contrary to both the plain language of the statute and the clear extrinsic evidence of Congress's intent. The Court should reverse summarily pursuant to Rule 23.1.

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[2] The district court also granted judgment in favor of defendants on the bank holding company interlocks, holding that in view of its disposition as to the bank interlocks it need not resolve the question of whether the bank holding companies were "competitors" of the interlocking insurance companies (App. 82a).

[3] The court of appeals reversed on the bank holding company interlocks as well, holding that a holding company and its subsidiary bank should be treated as a single entity for § 8 purposes (App. 40a).

ARGUMENT

I.

The Question of Statutory Construction Here Presented Is Important, Has Wide Impact and Should Be Settled Now.

The basic question in this case, unlike many presented to the Court, does not involve the application of broad legal norms to complex social facts. It requires only the construction of quite specific statutory language—"two or more corporations . . . other than banks, banking associations, trust companies and common carriers." The nature of the question is such, therefore, that the Court's consideration of it will not be aided by additional litigation in lower courts, producing in time opinions of other courts of appeals based on other factual records. The question is now ripe for decision by the Court.

Although the question is a quite narrow one—and, in our view, a quite simple one—it is one of wide impact and substantial importance. Thousands of serving directors are potentially affected by the court of appeals' ruling. Should it stand, the continued service of many of these directors may be called into question, and the future availability of experienced and capable directors for banks and other corporations sharply reduced. Within the private enterprise system, the responsibilities of bank directors are in many respects unique, since a solvent and liquid banking system is the *sine qua non* of a functioning economy, and persons experienced in the management of other financial institutions, such as insurance companies, are particularly well qualified to bear those responsibilities. Thus, the result reached by the court of appeals merits the strictest scrutiny in the public interest.

Moreover, review at this time is important as a matter of both the sound administration of the antitrust laws and the efficient use of judicial resources.

The conformance of business conduct to legal requirements results to a large extent from voluntary compliance based upon the acceptance by clients of the advice of counsel. *Cf. Upjohn Co.* v. *United States*, 449 U.S. 383, 392 (1981). Section 8 as written presents a reasonably clear legislative mandate and enables counsel in most instances to render definitive advice. Consequently, despite the great reluctance of management to tell a serving director that his tenure must end, compliance with § 8 has been excellent and actions to enforce it have rarely been required. *See United States* v. *W. T. Grant Co.*, 345 U.S. 629, 630 (1953); *Protectoseal Co.* v. *Barancik*, 484 F.2d 585, 586 (7th Cir. 1973) (Stephens, J.); *see also* 16C J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 20.01, at 20-10 (1981).

The decision of a single and divided panel of a court of appeals rejecting for reasons of "policy" both the clear language of the statute and decades of common understanding does not provide a basis for definitive advice by responsible counsel. In such circumstances, corporate clients cannot be expected to reconstitute their boards to conform to the position of the Antitrust Division. Unless this Court speaks to the question now, considerable additional litigation will undoubtedly ensue.

Such additional litigation is pointless. In the unlikely event this Court should affirm the court of appeals, compliance will follow promptly throughout the country. If this Court reverses, as we submit it should, the uncertainty created by the court of appeals' decision will disappear. Whatever the result, the question presented is a paradigm of "an important question of federal law which has not been,

but should be, settled by this Court," *see* Rule 17.1(c), and it should be settled now.

II.

The Court Should Reverse Summarily.

The position of the opposing parties on the merits of this case and all avenues of analysis possibly material to its decision are fully explicated in the three opinions below. The majority opinion in the court of appeals is clearly wrong in its view of the statutory language, the legislative history, and the clear understanding of subsequent Congresses. The district court's opinion, endorsed by the dissenting judge in the court of appeals, is clearly correct on all these points. This Court should reverse summarily pursuant to Rule 23.1 on the opinion of the district court.

The plain language of the statutory provision in question —"two or more corporations . . . other than banks, banking associations, trust companies and common carriers"—is indeed plain: banks are excluded. Judicial inquiry should go no further. *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 197-201 (1976); *United States* v. *Oregon,* 366 U.S. 643, 648 (1961). Indeed, if this language is considered "equivocal," as it was by the court of appeals, one must wonder if it is possible for Congress to legislate other than in an "equivocal" fashion so long as it uses the medium of the English language.[4]

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[4] The court of appeals' disregard of the plain language of the phrase "other than banks" is even more suprising when the whole of the "industrial corporations" provision is analyzed: The first modification of the general language "two or more corporations" is *"any one of which* has capital, surplus, and undivided profits aggregating more than $1,000,000" (emphasis added). One could hardly find more compelling proof that had Congress meant the exclusion pertaining to banks to read *"any one of which is other than a bank"* it would have said precisely that.

Moreover, if resort be had to the legislative history it shows, as the district court noted (see App. 65a-77a), that the quoted language was inserted by the Conference Committee for the sole purpose of making clear beyond peradventure what had already been intended—that banks were subject solely to the provisions specifically dealing with banks and not to the "industrial corporations" provision:

> The conference . . . put in 'banks and banking associations' in order to make perfectly clear what in my opinion is already clear; because in the preceding paragraph we had passed a section with reference to interlocking directorates of banks, and there we made the limitation $5,000,000. Now, it would be idiotic to say that we included also banks and banking associations in the paragraph referring to industrial corporations; and in order to make the paragraph perfectly plain, we inserted 'other than banks and banking associations' and common carriers, which had no effect upon the meaning of that section.

51 CONG. REC. 16,271 (1914) (statement of Rep. Webb); *accord,* 51 CONG. REC. 16,271-72 (1914) (statement of Rep. Sherley) (quoted at App. 70a-71a).[5]

The court of appeals disregarded as "ambiguous" (App. 25a) clear and direct evidence that Congress intended what

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[5] Representative Webb's statement was made in response to a "point of order" raised by Representative Mann, who objected that the Conference Committee had substantively changed the bill by adding the exclusionary language in question and that the House Conferees had exceeded their authority in agreeing to that change. Though disagreeing with Representatives Webb and Sherley as to whether the bill would have applied to bank-nonbank interlocks without the exclusionary language, Representaive Mann agreed that it did not once the language had been added. The Speaker overruled his "point of order." 51 CONG. REC. 16,269-73 (1914).

it said in the plain and precise language at issue—evidence comprising the statements of the bill's managers, its supporters and opponents alike, and legislative counsel.[6] Instead, the court preferred "less direct evidence" of the "unmistakable," in its view, "general purpose" of the Clayton Act, relying upon such "legislative history" as political party election platforms and other rhetorical denunciations of giant financial combines (App. 11a, 12a, 19a). The materials recited by the court of appeals are history, but not legislative history; they provide some of the explanation of why we have antitrust laws, but they offer no assistance at all in determining what those laws are. It was exactly this sort of judicial revision of legislative means for the purpose of better achieving supposed legislative ends that the Court rejected as error in *Ernst & Ernst, supra,* and *SEC* v. *Sloan,* 436 U.S. 103, 116-17 (1978). *See also United States* v. *Sisson,* 399 U.S. 267, 297-99 (1970) (legislation often results from compromise; it is not for the courts to go beyond the limits set by Congress to carry out some "broad policy").

Finally, while there is no need to proceed further, the court of appeals' rejection of sixty years of common understanding following the passage of § 8—manifested by all concerned and accepted as a predicate for continuing

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[6] Testimony by former counsel to the House Committee on Banking and Currency—"I think there is grave concern as to whether a director in a great life insurance company should be a director in a bank. You have failed to cover that feature."—was rejected as "imp[lying] no view as to the scope of the competing corporations provision" (App. 25a). Remarks by Representative Cullop on the floor of the House that the "industrial corporations" paragraph "has no reference whatever to the banking business" were discarded as both "incidental and ambiguous" (App. 27a-28a). And, Representative Webb's definitive representation that "it would be idiotic to say we included also banks and banking associations in the paragraph referring to industrial corporations" was afforded "little weight" (App. 28a-30a).

legislative debate and action—was, at the least, cavalier. While this Court has cautioned against undue reliance on the views of subsequent Congresses, they are to be considered if doubt remains after analysis of the statutory language to be construed and its legislative history. *See Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980); *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 596 (1980). In fact, when the precise intent of the enacting Congress is obscure, as the court of appeals erroneously found here, the views of subsequent Congresses "are entitled to significant weight." *Seatrain Shipbuilding Corp., supra.*

Here, the views not only of Congress but also of the enforcement authorities, the business community and the Bar have been uniform for decades: Section 8 "does not apply to interlocks between commercial banks and competing financial institutions, such as mutual savings banks, insurance companies, and small loan companies." Letter from Rep. Wright Patman to Hon. Arthur F. Burns (June 1, 1970), *reprinted in* THE BANKING REFORM ACT OF 1971: HEARINGS ON H.R. 5700 BEFORE THE HOUSE COMM. ON BANKING AND CURRENCY, 92d Cong., 1st Sess. 270, 271 (1971); *accord,* STAFF OF ANTITRUST SUBCOMM. OF HOUSE COMM. ON THE JUDICIARY, 89th Cong., 1st Sess., INTERLOCKS IN CORPORATE MANAGEMENT 25 (Comm. Print 1965) ("no prohibition in the statute against . . . either vertical or horizontal, direct or indirect, interlocks between the banking organizations and other types of corporations"); REPORT OF THE FEDERAL TRADE COMMISSION ON INTERLOCKING DIRECTORATES, H.R. DOC. NO. 652, 81st Cong., 2d Sess. 10 (1950); 16C J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 20.03 at 20-29 (1981) (§ 8 "does not prohibit interlocks between a banking institution and a business corporation").

Several efforts to extend the statute's prohibition to bank-nonbank interlocks have been made, but all have failed. *See* H.R. 11572, 89th Cong., 1st Sess. (1965); H.R. 2509, 90th Cong., 1st Sess. (1967); H.R. 3245, 92d Cong., 1st Sess. (1971); H.R. 13581, 93d Cong., 2d Sess. (1974); H.R. 14997, 93d Cong., 2d Sess. (1974); H.R. 4406, 94th Cong., 1st Sess. (1975). In each instance Congress rejected the change in law and practice here ordained by the court of appeals.

Based on its understanding of existing law, Congress finally did undertake in 1978 a comprehensive revision of the regulations governing interlocks among financial institutions. The Depository Management Interlocks Act, 12 U.S.C. §§ 3201-207 (Supp. 1980) ("DMIA"), selectively regulates, *inter alia*, the positions a bank director may accept. Congress chose, however, to leave unregulated interlocks between banks and non-depository institutions, and efforts to extend the act to cover interlocks between banks and other financial institutions, *such as insurance companies*, were defeated in committee. H.R. REP. 1383, 95th Cong., 2d Sess. 200-201, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 9273, 9332 (additional views of Rep. St. Germain).[7] The court of appeals' decision negates this legislative choice, and renders surplusage the DMIA's coverage of director interlocks between commercial banks and other depository institutions.

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[7] The reasons for the committee's rejection of proposals to further extend Section 8 are readily apparent from the minority report: "The primary concern of the minority with regard to this title has been to make certain that the conflicts of interest involved in some interlocking directorates will be adequately regulated. However, it is also imperative that the legislation permit sufficient flexibility to allow the vast pool of expertise available in the financal community to work together in a procompetitive atmosphere. The minority believes that these two goals have been achieved in this bill." H.R. REP. 1383, *supra*, 238, 241 (minority views on H.R. 13471).

In sum, every arguably relevant consideration supports the decision of the district court. Reversal of the court of appeals' basic holding is compelled, and fuller briefing and argument unnecessary.

Nor does the secondary issue of § 8's application to bank holding companies require further consideration. The court of appeals held that the § 8 status of the petitioner bank holding companies was the same as that of their subsidiary banks, adopting the Federal Reserve Board's ruling that a holding company and its bank subsidiaries should be considered a "single entity" for § 8 purposes (App. 38a-40a). The district court did not reach that question (App. 82a), and this Court need not do so.

If banks are not subject to the "industrial corporations" provision—as clearly they are not—then the challenged interlocks of their parent bank holding companies are not prohibited by that provision whatever view is taken of the "single entity" theory: if the theory is accepted, then the petitioner bank holding companies are "banks" not subject to the provision; if the theory is rejected, then they are not "competitors" of the interlocking insurance companies, since their alleged status as such is wholly dependent upon the "single entity" theory. Only if banks were erroneously held subject to the "industrial corporations" provision, would the Court have occasion to reach the additional defense interposed by the bank holding companies—that they are not "competitors" of the interlocking insurance companies merely by virtue of their subsidiary banks' status as such (App. 37a-38a, 82a).

Conclusion

For the reasons stated, the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit should be granted and that judgment should be summarily reversed.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether Section 8 of the Clayton Act, which expressly prohibits an individual from serving simultaneously as a director of "two or more [competing] corporations . . . other than banks," also prohibits an individual from serving as a director of a bank or bank holding company and a corporation other than a bank, such as an insurance company, despite more than sixty years of contrary understanding on the part of Congress, the antitrust enforcement agencies and business.

PARTIES

In addition to the parties shown in the caption here, the parties in the Court of Appeals below were:*

Bank of America National Trust & Savings Association
Bankers Trust Company
Bankers Trust New York Corporation
Crocker National Bank
Crocker National Corporation
The Equitable Life Assurance Society of the United States
Metropolitan Life Insurance Company
The Mutual Life Insurance Company of New York
The Prudential Insurance Company of America
Paul A. Gorman
Emmett G. Soloman
Thomas R. Wilcox

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* In accordance with Rule 28.1 of the Rules of the Supreme Court, the parent companies, subsidiaries and affiliates of each party are set forth in the Appendix hereto.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1487

BANKAMERICA CORPORATION, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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JOINT BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (Chief Circuit Judge Browning and Senior District Judge Christensen; Circuit Judge Kennedy dissenting), is reported at 656 F.2d 428 and reprinted in the appendix to the petition for certiorari ("Pet. App.") as Appendix A at pages 1a-50a. The opinion of the District Court for the Northern District of California (Chief District Judge Peckham) is reported at 422 F. Supp. 686 and is reprinted as Appendix B in the appendix to the petition for certiorari at pages 51a-85a.

JURISDICTION

The decision of the court of appeals was entered on September 14, 1981. A timely petition for rehearing and suggestion of rehearing *en banc* was denied on November 10, 1981. (*See* Pet. App. 86a-87a.) An uncontested motion to stay the mandate pending the filing, consideration and disposition by this Court of a petition for a writ of certiorari was granted by the court of appeals by order dated November 23, 1981. The petition was filed on February 8, 1982, and granted on June 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute here in issue is the unnumbered fourth paragraph of Section 8 of the Clayton Act, 38 Stat. 732, as amended, 15 U.S.C. § 19, which provides:

> No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

The full text of Section 8 is reprinted as Appendix D in the appendix to the petition for certiorari at pages 88a-90a.

STATEMENT

A. The Parties

Petitioners are ten corporations and three individuals. The corporations are three banks,[1] their three related

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[1] Bank of America National Trust & Savings Association, Bankers Trust Company, and Crocker National Bank.

holding companies,[2] and four mutual life insurance companies.[3] The individuals are three persons who at the time of suit were directors of one bank and one insurance company (the "bank interlocks"), or were directors of one bank holding company and the one insurance company (the "bank-holding interlocks"). The case involves no horizontal bank-to-bank interlock, no horizontal bank-holding-to-bank-holding interlock, and no horizontal insurance-to-insurance interlock.

B. The Stipulated Record

This is a test case presenting the legal issue whether an interlocking directorate between a bank or a bank holding company and a corporation other than a bank is prohibited by Section 8. The fourth paragraph of Section 8 forbids a person to be at the same time a director of two or more corporations engaged in commerce, any one of which has capital, surplus and undivided profits of more than $1 million, "other than banks, banking associations, [or] trust companies," if the corporations are competitors so that the elimination of competition between them by agreement would violate the antitrust laws.

In the district court, the parties entered into a series of stipulations and waivers as well as an agreed statement of facts. (J.A. 21-31, 56-67.) In pertinent part, the stipulations conceded the existence of the challenged interlocks, including both the bank interlocks and the bank holding interlocks (J.A. 27-28, 63), established that each corporate defendant is engaged in interstate commerce and has capital, surplus and undivided profits aggregating more than $1,000,000 (J.A. 25-27, 60-63), and pro-

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[2] BankAmerica Corporation, Bankers Trust New York Corporation and Crocker National Corporation, respectively.

[3] The Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, The Mutual Life Insurance Company of New York, and The Prudential Insurance Company of America. Mutual insurance companies are owned by their policyholders.

vided that the two corporations in each of the bank interlocks are "competitors" in certain mortgage and real estate loans (J.A. 28-31, 64-66).

Accordingly, these stipulated facts, together with certain waivers (J.A. 23, 58), reflected an agreement by both the Government and petitioners that the bank interlocks satisfy all statutory requirements of the fourth paragraph of Section 8 with only one exception as to which there was, and is, a disputed question of law, *i.e.*, whether a common director of one bank and one nonbank, here an insurance company, is a director of "two or more corporations . . . other than banks" as required by the statute.

So far as the bank holding interlocks are concerned, the stipulations included an express waiver by the Government of any claim that a bank holding company "by itself or through its subsidiaries other than [its bank subsidiary] . . . is a competitor of any life insurance defendant." (J.A. 23-24, 59.) Although petitioners admitted that each bank holding company controls its bank subsidiary to the extent that it owns the stock and elects the directors of its bank subsidiary, the Government in turn agreed that the directors of each bank subsidiary "manage the bank and select the officers who control the operations and activities" of the bank subsidiary. (J.A. 26, 61, 62.) Thus, if it is concluded that Section 8 prohibits the challenged bank interlocks,[4] the stipulated record presents the additional legal question whether the commercial operations of a subsidiary bank may be vicariously attributed to its bank holding company, making the parent

[4] The Government reserved the right to argue that a bank holding company is not a bank" for purposes of the "other than banks" clause of Section 8 and that it may be deemed to be a "competitor" of a life insurance company solely by virtue of the activities of its bank subsidiary. (J.A. 24, 59.) But the Government never, in fact, seriously argued the point and, as the district court observed (p. 7, *infra*), effectively conceded that it would be anomalous to say that a holding company is simultaneously a bank and not a bank.

a competitor of the insurance company for purposes of Section 8.

C. Statutory Structure

Interlocking relationships between corporations are not absolutely prohibited by the Clayton Act. Rather, Sections 8 and 10 of the Clayton Act contain three sets of provisions that regulate selected types of interlocking relationships within various limited classes of corporations. The first three unnumbered paragraphs of Section 8—which are not directly in issue here—are known as the "banking" paragraphs because they deal with common directors, officers and employees of various banking institutions, forbidding the practice in some situations and permitting it in others.[5] Section 10 of the Clayton Act—which also is not directly at issue here—regulates interlocks between common carriers subject to the Interstate Commerce Act and their suppliers and securities underwriters.

As distinct from these "banking" and "common carrier" provisions, the unnumbered fourth paragraph of Section 8—which *is* at issue here—deals only with common directors of "two or more corporations . . . other than banks, banking associations, trust companies and common carriers."[6] When Section 8 was being considered by Con-

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[5] As discussed *infra* pp. 22-25, in 1978, the banking provisions of Section 8, though not expressly repealed, were for all practical purposes supplanted by the Depository Institution Management Interlock Act of 1978, 12 U.S.C. §§ 3201 *et seq.* (Supp. III 1979). *See* Regulation L, 12 C.F.R. 212.7 (1981). In enacting this recent legislation on banking interlocks Congress specifically rejected all proposals to extend the reach of Section 8 to bank/non-bank interlocks and continued the Congressional pattern of a highly selective approach to interlocks, which leaves many interlocks among competitive financial institutions wholly unregulated.

[6] This provision of Section 8 requires no showing of wrongdoing, actual restraint of trade, or illicit personal gain as long as the four statutory requirements are met. There are no allegations of such wrongful conduct with respect to any of the interlocks here.

gress, this fourth paragraph was often referred to as the "industrial corporations" provision, and the same term is still widely used.

D. Longstanding Business Practices and Prior Administrative Interpretation

When Section 8 was enacted in 1914, directors of banks sat on the boards of numerous non-banking corporations, including insurance companies, as they had for many years. As shown below (pp. 27-29, 38, *infra*), this practice was specifically attacked by many of the proponents of legislation dealing with interlocking corporate relationships and it was therefore well known to Congress. In the 68 years since the Clayton Act was enacted, banks and insurance companies have continued to share directors. The practice is so commonplace that, according to present industry statistics compiled by the American Council of Life Insurance, as many as 50 percent of the directors of the nation's life insurance companies may also be directors of banks.[7]

Although the widespread sharing of directors by banks and insurance companies has been well known, neither the Department of Justice nor the Federal Trade Commission ever invoked Section 8 to challenge this practice, until the Department of Justice brought these test cases in 1975. Moreover, numerous legislative proposals designed to prohibit interlocks between banks and insurance companies have been presented to Congress and uniformly rejected even though endorsed by both of the antitrust enforcement agencies.

E. Proceedings Below

In 1975, the Government departed from its prior administrative recognition of the inapplicability of Section

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[7] *See* Brief of the American Council of Life Insurance as Amicus Curiae in Support of the Petition at 4. In the proceedings below, both lower courts noted that about 40% of the insurance company directors are also directors of banks, a statistic based on the Government's own estimate and used by the defendants throughout the proceedings without objection.

8 to bank/non-bank interlocks and initiated these companion test cases. The principal focus of the Government's challenge was the bank/insurance interlocks, which were challenged on the ground that the provision in Section 8 requiring a common director of "two . . . corporations . . . other than banks" is satisfied even though only one of the corporations meets the "other than banks" requirement.

The Government's subordinate line of attack was directed to the bank holding/insurance interlocks. It rested on the proposition that the commercial operations of a subsidiary bank must be attributed vicariously to the parent bank holding company.

In the district court, both sides filed cross motions for summary judgment based on the stipulated record. The court granted defendants' motion for summary judgment and dismissed the Government's cases. Chief Judge Peckham ruled that a "normal reading" of the statutory language "two or more corporations . . . other than banks" compels the conclusion that *both* corporations sharing a director must be "other than banks" in order to satisfy that explicit statutory requirement. (Pet. App. 56a.) Judge Peckham found that this conclusion was supported by the overall structure of the Clayton Act, by the legislative history of the statute and by the long-standing interpretation of the statute by Congress and the relevant administrative enforcement agencies. (Pet. App. 58a-77a.)

The Government's challenge to the bank holding interlocks assumed that the bank interlocks would be found invalid. As Judge Peckham observed: "[T]he Government in effect concedes that, if this court decides that section 8 *does not* apply to the challenged bank interlocks, it would be anomalous to conclude that section 8 applies to the bank holding interlocks." (Pet. App. 82a, emphasis in original.) Thus, Judge Peckham held that even if the commercial operations of the subsidiary banks could be attributed to their holding company parents, "so too must

their status as banks," and hence the challenged bank holding interlocks would likewise fail to satisfy the statutory requirement of "two corporations . . . other than banks." (Pet. App. 83a.)

On appeal, a divided panel of the court of appeals reversed the district court. (Pet. App. 48a.) The majority acknowledged that Judge Peckham's straightforward interpretation of the statute was plausible, but concluded that the statute could also be construed as the Government contended. (Pet. App. 8a.) Having thus discerned an ambiguity that others have not detected, the panel majority invoked what it perceived as a broad and overarching legislative purpose to prohibit all director interlocks between competitors. (Pet. App. 19a.) Relying on its view of the statute as part of a comprehensive regulatory scheme without significant gaps, the majority resolved the ambiguity it had erected by accepting the strained reading of the statute advanced by the Government. Judge Browning's opinion for the majority disagreed with every element of Judge Peckham's detailed analysis of the explicit statutory language of Section 8 and the more than 60 years of legislative and administrative understanding that the statute does not apply to bank/non-bank interlocks.

Judge Kennedy, in his dissent, adopted the district court's analysis. (Pet. App. 48a.) He pointed out that the nebulous statements of general legislative purpose on which the majority relied were of little help in construing the very precise statutory provision at issue here. Judge Kennedy characterized the majority's judicial construction as an effort to "patch . . . up" what the majority viewed as an "imperfection" in the legislative design. But, he said, what the majority saw as an imperfection was "in fact the result of compromises which are the very essence of the legislative process." (Pet. App. 49a.) In response to the majority's emphasis on the very general overall purpose of the Clayton Act and Section 8, Judge Kennedy noted that the obvious specific purpose of the "other than banks" requirement was to *narrow* the range

of the statute's coverage. He then observed that, if Congress had intended that clause to require only one of the two corporate parties to an interlocking relationship to be other than a bank, "it would have used much different language to do so." (Pet. App. 49a-50a.)

SUMMARY OF ARGUMENT

The main question for decision in these cases is whether the bank interlocks, involving a common director of a bank and an insurance company, are prohibited by the provision of Section 8 of the Clayton Act that applies only to "two or more corporations . . . other than banks, banking associations, trust companies or common carriers."

All direct evidence indicates that this question must be answered negatively: the plain meaning of the specific statutory language, the use of explicit language to permit only one of the four statutory requirements—the $1,000,000 capital requirement—in the same clause to be met by just one of the interlocked corporations, the relationship of the fourth paragraph of Section 8 to the remainder of the Clayton Act's statutory scheme and structure for regulating interlocking relationships among corporations, the legislative history of the Clayton Act, and the 60-year history of consistent administrative and congressional interpretation and acceptance of the widespread and open practice of bank-insurance interlocks throughout the nation's business community.

Neither the Government nor the majority opinion below cites a single item of direct evidence that bank/nonbank interlocks are covered, or were ever intended by Congress to be covered, by the provision in Section 8 that is limited to a common director of "two or more corporations . . . other than banks." Instead, the majority opinion of the court of appeals reversed the normal process of statutory construction and relied on a perceived, but clearly mistaken, "general" congressional purpose to make Section 8 part of a comprehensive statutory scheme to prohibit all interlocking relationships among competi-

tors. The court of appeals was obviously animated by a desire to close what it perceived to be an inadvertent gap in statutory coverage. In its zeal to do so, however, the lower court went beyond the bounds of permissible statutory construction, undertook to resolve a policy question that is appropriately the province of Congress and not the courts, and flouted the congressional compromises that resulted in the deliberate non-regulation of many interlocks.

Finally, if the petitioners are correct in their position that Section 8 does not prohibit the challenged bank interlocks, the Government should concede here, as it did below, that the subordinate attack upon the bank holding interlocks should also be dismissed. But even if the primary question were to be resolved by this Court against the validity of the bank interlocks, the statute nonetheless does not reach the bank holding interlocks because, on the stipulated record in these cases, the operations of a bank subsidiary cannot be vicariously attributed to its parent bank holding company which otherwise is not a competitor of an insurance company.

ARGUMENT

I. A BANK/NON-BANK INTERLOCK DOES NOT SATISFY THE STATUTORY REQUIREMENT THAT LIMITS SECTION 8 OF THE CLAYTON ACT TO INTERLOCKS OF "TWO OR MORE CORPORATIONS . . . OTHER THAN BANKS"

"[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). In this case, the Court is asked to construe the fourth paragraph of Section 8 of the Clayton Act. That paragraph contains four separate clauses each of which modifies the phrase "two or more corporations." The full text of the paragraph is set forth below, with its four modifying clauses separated and numbered in the same manner as in the district court's opinion:

> No person at the same time shall be a director in *any two or more corporations*,
>
> (1)
>
> any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000,
>
> (2)
>
> engaged in whole or in part in commerce,
>
> (3)
>
> other than banks, banking associations, trust companies, and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven,
>
> (4)
>
> if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. 15 U.S.C. § 19 (emphasis added).

As Chief Judge Peckham pointed out, each of the four limiting clauses modifies the phrase "two or more corporations." (Pet. App. 57a.) "[I]t is readily apparent to the court," he said, "that all of the four limiting clauses apply to both corporations involved in an interlock, except for the first clause which by its own specific terms may be satisfied by 'any one' of the two interlocked corporations." (*Id.*) Accordingly, both of the interlocked corporations must be engaged "in commerce" to satisfy clause 2, both must be "competitors" to satisfy clause 4, and, critically, both must be "other than banks" to satisfy clause 3. If Congress had intended that only one of the interlocked corporations need satisfy the "other than banks" requirement, it would have stated so explicitly,

as it did in the requirement that only one corporation must have $1,000,000 in capital.[8]

Here, the bank and non-bank insurance companies involved in the bank interlocks are not "two or more corporations . . . other than banks." One bank corporation plus one corporation that is not a bank do not add up to "two . . . corporations . . . other than banks." Accordingly, the challenged interlocks are plainly outside the scope of Section 8.

The opinion of the court of appeals majority did not directly confront, much less refute, the district court's straightforward analysis of the plain meaning and proper textual construction of the words of the statute.[9] Indeed, as noted above, the majority conceded that Judge Peckham's reading of the "other than banks" clause was plausible. (Pet. App. 8a.) However, without serious analysis of the structure or specific language of the four limiting clauses, the majority asserted that the "other than banks" requirement could be read with equal plausibility to mean "two or more corporations . . . [*not all of which are*] banks, banking associations, trust companies and common carriers." (Emphasis and brackets in original.) (Pet. App. 8a.) Of course, the bracketed language added by Judge Browning is not what the statute says. By substituting the bracketed language for the actual words of the statute, the court of appeals has engaged in an impermissible attempt to seek "refined arguments to show that the statute does not mean what it says. . . ." *United States v. Wurzbach*, 280 U.S. 396, 398 (1930) (Holmes, J.).

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[8] As Judge Kennedy, dissenting in the court of appeals, put it: "[H]ad Congress intended the exemption to cover only pure bank interlocks, it would have used much different language to do so." (*Id.* at 49a.)

[9] As this Court has often observed, Congress is presumed to know the meaning of words and rules of grammar. United States v. Goldenberg, 168 U.S. 95 (1897).

The majority sought support for its interpretation of the "other than banks" clause in the context of the rest of the Clayton Act's provisions governing interlocking corporate relationships. When considered in that context, however, the majority's interpretation inevitably leads to contradictions and inconsistencies. Relying in part on dicta in a Federal Trade Commission opinion (subsequently vacated) in a case arising under Section 5 of the Federal Trade Commission Act.[10] the panel majority concluded that the "other than banks" requirement refers back to the banking provisions of Section 8 and thus serves only to exclude those banking interlocks of the type that are regulated elsewhere in Section 8.[11] In this way, according to the majority opinion below, the "other than banks" clause should be construed to exclude only the horizontal bank-to-bank interlocks of the type that are regulated elsewhere, and then Section 8 as a whole would cover all horizontal interlocks in keeping with the perceived congressional purpose. (Pet. App. 9a.)

A fatal problem with this reading is that it does not and cannot account for the presence of "common carriers" in the same "other than" clause. Common carrier interlocks are "regulated elsewhere" in Section 10 of the Clayton Act, which was enacted at the same time as Section 8 and was included in Section 8 throughout most of the provision's legislative history.[12] Section 10, however,

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[10] In re Perpetual Federal Savings & Loan Ass'n, 90 F.T.C. 608, 636-37 (1977), *vacated*, 94 F.T.C. 401 (1979).

[11] The court of appeals majority believed that this reading of the phrase "other than banks" would attribute "the same meaning to the phrase in the competing corporations paragraph" as in the banking paragraphs. However, the banking paragraphs and the industrial corporations provision do not contain identical phrases. The banking paragraphs regulate interlocks between a bank and "any other banking association, savings bank, or trust company," while the industrial corporations provision applies to two or more corporations other than "banks, banking associations, [or] trust companies." (Pet. App. 9a.)

[12] *See* pp. 30-32, *infra*.

regulates only certain vertical interlocks involving common carriers and their suppliers. Section 10 does not prohibit such interlocks but requires that a common carrier may deal with an interlocked supplier only after taking competitive bids. If the "other than . . . common carriers" requirement in Section 8 is read as the court of appeals read the "other than banks" requirement and is thus taken to refer only to vertical carrier interlocks of the type regulated elsewhere, *i.e.*, in Section 10, the "other than" clause becomes meaningless as an exception for common carriers because Section 8 does not cover any vertical interlocks at all.

Indeed, if the "other than common carriers" requirement refers only to vertical interlocks of the type regulated in Section 10—as the court of appeals' "normal reading" requires—one would be compelled to conclude that Section 8 prohibits horizontal interlocks between two common carriers, since horizontal interlocks of common carriers are not "regulated elsewhere" in the Clayton Act. But this reading would contradict the explicit statutory language requiring "two corporations . . . other than . . . common carriers," and not even the Government has suggested that Section 8 prohibits interlocks between two competing common carriers.

As Chief Judge Peckham recognized, the "other than" clause, rather than incorporating any convoluted "regulated elsewhere" concept, reflects the straightforward conclusion "that Congress, having regulated banks in the first three paragraphs of section 8 and having regulated common carriers in section 10, wished to make clear that these classes of corporations were not to be regulated at all in paragraph 4 of section 8." (Pet. App. 64a-65a.) "Indeed," the district court noted, "this is the only interpretation that provides a consistent explanation of the 'other than banks and common carrier' language that Congress utilized in Section 8." (*Id.* at 65a.)

The majority opinion of the court of appeals made no serious efforts to harmonize its interpretation of the

"other than banks" language with the "other than common carriers" phraseology found in the same statutory clause. The panel majority, in effect, threw up its hands and asserted that "[t]here is no basis for the assumption that [the 'other than' language is] . . . to be read in the same way" with respect to both banks and common carriers. (*Id.* at 24a.) Thus, the court below was willing to accept the Government's extraordinary proposition that the statutory phrase "two or more corporations . . . other than banks . . . or common carriers" means one thing as to banks (only one corporation need be other than a bank), and something entirely different as to common carriers (both corporations must be other than common carriers).[13]

There is simply no warrant for the court of appeals' statutory construction that allows the simple phrase "other than" to have two different meanings when applied to two consecutive terms—"banks" and "common carriers"—that it modifies in the same statutory clause. In *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980), the Court recently rejected a similar strained statutory interpretation stating, "[W]e cannot accept respondent's position without unreasonably giving the word 'filed' two different meanings in the same section of the statute". Since the construction of Section 8 urged by the Government subjects both the structure and the explicit lan-

[13] The court below also urged that Congress did not have the same "general antipathy" toward carrier interlocks as it had for bank interlocks, which the court viewed as providing some support for its two different interpretations of the "other than" clause for banks and common carriers. (Pet. App. 25a.) The predicate for this assertion is plainly wrong, because throughout the congressional debates and earlier versions of Section 8, Congress was just as much concerned with common carrier interlocks as with bank interlocks. (App. Below, at C 29-30, App. D 38-39, App. E 55-56.) Indeed, since Congress provided penal sanctions for violation of Section 10, but did not provide such sanctions for violation of Section 8, if there were a difference in the Congress' antipathy toward various types of interlocks, it was more specifically aimed at interlocks governed by Section 10.

guage of the statute to significant stress, it must be rejected.

II. CONTRARY TO THE DECISION OF THE COURT BELOW, CONGRESS HAS ADOPTED A SELECTIVE RATHER THAN A COMPREHENSIVE APPROACH TO INTERLOCKING CORPORATE RELATIONSHIPS, PARTICULARLY THOSE REGARDING BANKS

The fundamental and erroneous premise of the majority opinion below is the assumption that the Clayton Act is part of an overall congressional regulatory scheme that is hostile to all interlocks between competitors. Based on this invalid premise, the court of appeals concluded that the petitioners here are seeking an implied repeal of, or an exemption from, the antitrust laws. The panel then rejected the district court's construction of the plain meaning of the statutory language because of the asserted absence of any clear and manifest evidence of a specific legislative intent to exempt bank-insurance interlocks from the purportedly all-encompassing reach of the fourth paragraph of Section 8.[14] In attempting to

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[14] Petitioners do not seek either an implied repeal of or an exemption from the antitrust laws. They ask only for a reasonable interpretation of one of the clear-cut requirements of Section 8. *See, e.g.*, United States v. American Bldg. Maintenance Indus., 422 U.S. 271, 283 (1975) (the "in commerce" requirement of Section 7 of the Clayton Act does not apply to all corporations subject to Congress' commerce power because "neither the legislative history nor the remedial purpose of § 7 . . . support an expansion of the scope of § 7 beyond that defined by its express language."). *See also* Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974); FTC v. Bunte Bros., Inc., 312 U.S. 349 (1941).

Moreover, petitioners concede that apart from the McCarran-Ferguson Act's exemption for the business of insurance, they remain subject to the antitrust laws generally. If any of the interlocks here in question were to be used as a vehicle for any restraint of trade in violation of the Sherman Act or any of the other provisions of the Clayton Act, petitioners' position on the "other than banks" requirement would create no obstacle whatever to an appro-

close what it thought to be a loophole in the explicit statutory language, the court of appeals thus stepped far beyond the bounds of permissible judicial interpretation to enlarge the reach of the statute at the Government's request. This Court's caution in *Iselin v. United States*, 270 U.S. 245, 251 (1926) (Brandeis, J.), is especially applicable here: "What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope." [15]

In point of fact, the Clayton Act does not reflect an overall congressional scheme hostile to all corporate interlocks involving competitors, and its omission of the interlocks the Government seeks to reach is not inadvertent. Indeed, Congress decided in 1914, and has never departed from that decision thereafter, to regulate interlocks under a highly selective approach. As a result, some interlocks are regulated in one fashion, others are regulated in a different fashion, and many interlocks (including those challenged here) are left totally unregulated.

The Clayton Act regulates corporate interlocks according to three separate and distinct categories of business organizations, generally identified throughout the statute's legislative history as (1) common carriers, (2) banking institutions, and (3) industrial corporations. Recognizing that interlocking business relationships may create different problems requiring different solutions, Congress deliberately established these separate categories and adopted

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priate Government antitrust enforcement action. However, despite the widespread practice of bank-insurance interlocks for many decades, there is not a single reported case of any abuse leading to a restraint of trade in violation of either the Sherman Act or the other provisions of the Clayton Act.

[15] *See also* Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 534 (1947).

a distinct set of rules for the business organizations falling into each category.[16]

This selective approach adopted by Congress in the Clayton Act leaves many interlocks unregulated. Section 10 addresses certain types of interlocks between common carriers subject to the Interstate Commerce Act and various companies with which those carriers have a supplier or buyer relationship, and, as discussed above (p. 14, *supra*), it does not prohibit such interlocks but requires competitive bidding on transactions between the interlocked companies. Section 10 does not regulate, much less prohibit, any horizontal interlocks between competing common carriers.[17]

The banking provisions of Section 8 prevent a director, officer or employee of a member bank of the Federal Reserve System from serving as a director, officer or employee of a bank organized under the National Bank Act or the laws of any state, with seven specifically enumerated exceptions. Like Section 10, the banking provisions of Section 8 permit significant interlocks. The banking provisions have no application unless one of the interlocked companies is a member bank of the Federal Reserve. Barely one-third of the banks in the United States are members of the Federal Reserve System.[18] Thus, the

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[16] *See* H.R. Rep. No. 627, 63d Cong., 2d Sess. 18 (1914) ("the provisions of each paragraph are limited in their application to the corporations belonging to the class named herein").

[17] When the Clayton Act was enacted, Congress did not deal with interlocking directorates between competing common carriers. Although the Panama Canal Act of 1912 included a prohibition of certain interlocks between railroads and water carriers, *infra*, it was not until 1920 that Congress authorized the Interstate Commerce Commission to deal generally with horizontal interlocks between common carriers. *See* 49 U.S.C. §§ 11322 and 11911 (Supp. III 1979).

[18] In 1978, there were 15,206 total banks in the United States, FDIC, Operating Banking Offices, at (v) (1978), of which only 5,564 or 37% were members of the Federal Reserve System. Federal Reserve Board Annual Report, at 418. Table 19 (1978).

banking provisions do not apply to interlocks between state banks that are not members of the Federal Reserve System. And, even as to the Federal Reserve member banks, the banking provisions of Section 8 do not apply to any interlocks with (1) federal savings and loan banks, (2) federal intermediate credit banks, (3) federal home loan banks, (4) mutual savings banks, (5) credit unions, or (6) foreign banking corporations.[19]

The selective approach to corporate interlocks, as found in the Clayton Act's provisions applicable to common carriers and financial institutions, is likewise readily apparent in the industrial corporations paragraph of Section 8. It leaves many interlocking relationships completely unregulated and would continue to do so even if the "other than" clause were omitted altogether. For example, this provision applies only to shared *directors*. Hence a director (or an officer or employee) of one corporation is permitted to be an officer or employee of another corporation, including a horizontal competitor. This is so for industrial corporations even though the banking provisions in Section 8 and the more recently enacted Depository Institutions Management Interlocks Act, discussed *infra* pp. 22-25, take a different approach and forbid such interlocking relationships among banking institutions.

Similarly, the industrial corporations paragraph of Section 8 does not regulate interlocks between corporations with vertical relationships of any description. Accordingly, unlike the highly specialized regulation of vertical relationships involving common carriers found in Section 10 of the Clayton Act, the industrial corporations provision leaves supplier/customer and debtor/creditor interlocks wholly unregulated. Thus, even without the "other than banks" clause, Section 8 would not reach a director

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[19] Congress has consistently rejected proposed amendments that would have prohibited interlocks between banks and insurance companies. *See* pp. 22-25, 43-44, *infra*.

interlock between a bank and an industrial corporation to which it was a major lender, despite the fact that this was the principal concern of original proponents of legislation addressing interlocking relationships involving banks. (*See* pp. 27, 37-38 *infra.*) Moreover, interlocking relationships among potential competitors of any description are also wholly outside the scope of the industrial corporations provision. *See Paramount Pictures Corp.* v. *Baldwin-Montrose Chemical Co.*, 1966 Trade Cas. ¶ 71,678 at 82,065 (S.D.N.Y. 1966).

Congress' selective approach to dealing with interlocking corporate relationships is also manifest in legislation dealing with various types of specialized or regulated businesses.[20] Two years *before* enacting the Clayton Act, Congress decided to limit horizontal interlocks between railroad carriers and competing water carriers operating through the Panama Canal or elsewhere.[21] It was not until several years *after* enactment of the Clayton Act, that Congress decided to authorize the Interstate Commerce Commission to prohibit or approve horizontal interlocks between the common carriers it regulates.[22]

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[20] *See, e.g.*, 49 U.S.C. § 11343 (Supp. IV 1980) (interlocks between railroads and water carriers); 15 U.S.C. § 80a-10(b)(2) (vertical interlocks between registered investment companies and underwriters); 27 U.S.C. § 208 (interlocks between companies in the liquor industry); 47 U.S.C. § 212 (interlocks between communications carriers); and 49 U.S.C. § 1379 (Supp. III 1979) (interlocks between air carriers and any common carriers).

[21] Panama Canal Act, § 11, 37 Stat. 560, 49 U.S.C. § 11343 (Supp. IV 1980). In Section 10 of the Clayton Act, Congress chose to regulate only interlocks involving certain vertical buyer-seller relationships of common carriers, including both carrier/non-carrier interlocks as well as carrier/carrier interlocks. *See* Klinger v. Baltimore & Ohio R.R. Co., 432 F.2d 506 (2d Cir. 1970).

[22] 49 U.S.C. §§ 11322 and 11911 (Supp. III 1979); *see also* American Waterways Operators, Inc. v. United States, 386 F. Supp. 799 (D.D.C. 1974), *aff'd*, 421 U.S. 1006 (1975). In 1933, Congress amended the Interstate Commerce Act to make it unlawful for a non-carrier to acquire control, by use of interlocking directors, officers or shareholders, of any two or more carriers. 48 Stat. 217,

The same legislative pattern is also found in various other special statutes dealing with interlocks where a bank is one of the corporations. For example, Section 17(c) of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79q(c), passed by the same Congress that rewrote the banking paragraphs of Section 8 in the present form, regulates all interlocks between officers and directors of registered public utility holding companies and their subsidiaries and "any executive officer, director, partner, appointee, or representative of any bank, trust company, investment banker, or banking association or firm. . . ." Similarly, Section 305 of the Federal Power Act, 16 U.S.C. § 825d (1976 & Supp. III 1979) regulates, *inter alia*, certain vertical management interlocks between a public utility and any "bank, trust company, [or] banking association."[22] [23]

Even after these bank-insurance interlock cases were brought, Congress manifested its continuing purpose to deal specifically and selectively, and not as part of more general statutory provisions, with interlocking relation-

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49 U.S.C. § 11348. Although the ICC has regulated carrier/non-carrier interlocks both under 49 U.S.C. § 11348, 49 U.S.C. § 11322 and 11911 and under Section 10 of the Clayton Act, *see* 49 C.F.R. Part 1010 and Part 1112 (1981), the ICC has *never* attempted to enforce or prescribe any regulations purporting to subject carrier/non-carrier interlocks to the industrial corporations provision of Section 8 of the Clayton Act.

[23] *See also* 15 U.S.C. § 80a-10(c) (interlocks between directors of registered investment companies and officers, directors or employees of a bank); 12 U.S.C. § 78 (management interlocks between organizations primarily engaged in the underwriting, flotation, issue, public sale or distribution of stocks, bonds, or similar securities and member banks of the Federal Reserve System). Moreover, the federal agencies with administrative and rule-making authority under these statutes have interpreted them to permit certain interlocks between banks and other organizations. *See, e.g.*, 17 C.F.R. § 250.70 (1981) (Public Utility Holding Company Act of 1935); 18 C.F.R. § 45.2 (1981) (Federal Power Act); Letter of Board of Governors of the Federal Reserve System dated March 6, 1974, *quoted in* CCH Fed. Banking L. Rep. ¶ 96,201 (Banking Act of 1933).

ships between banks and other companies. In 1977 and 1978, when Congress had before it Judge Peckham's opinion holding that bank-insurance interlocks were not covered by Section 8, Congress made a comprehensive evaluation of the regulatory scheme for interlocks among financial institutions and enacted the Depository Institution Management Interlocks Act of 1978. 12 U.S.C. § 3201 *et seq.* (Supp. III 1979) ("Interlocks Act").

Efforts to prohibit bank-insurance interlocks as part of the Interlocks Act were rejected by Congress. Referring to this very case, Congressman St. Germain, as floor manager of the House bill, offered an amendment to provide explicit authority for the Justice Department to challenge interlocks between banks and insurance companies.[24] As explained by the Congressman:

> My amendment would complete the job started in committee by closing this loophole and assuring that the Nation's law enforcement agency, the Justice Department, could challenge anticompetitive interlocking directorships existing between insurance companies and banks. 124 Cong. Rec. 33,816 (1978).

The amendment was ruled out of order. *Id.* at 33,817-18. Earlier, the Department of Justice had suggested that what Congressman St. Germain sought to achieve "could be done quite simply, by omitting from that paragraph [of section 8] the word 'banks, banking associations, trust companies and' " so that "interlocking directorships between depository institutions and other firms with which they compete would be clearly covered by Section 8 of the Clayton Act." [25] However, this suggestion was not adopted.

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[24] The Congressman stated that such a provision had been in the bill originally but was deleted before it reached the House floor. 124 Cong. Rec. 33,816 (1978).

[25] Hearings on H.R. 9086 before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs, Part 3, 95th Cong., 1st Sess. 1571-72 (1977).

In the Senate several bills were introduced in 1977 to repeal the banking provisions of Section 8 of the Clayton Act and to expand the prohibitions of director interlocks involving financial institutions.[26] The principal Senate bill was S. 73, designed expressly to repeal the portion of Section 8 dealing with horizontal bank interlocks "and replace it with a broader prohibition" [27] of such interlocks.

These legislative proposals were before Congress in 1977-78 at a time when Chief Judge Peckham's ruling was the only judicial precedent on bank-insurance interlocks, prior to its reversal by the majority opinion below. Nonetheless, after considering specific proposals to prohibit bank-insurance interlocks, Congress in 1978 enacted the Interlocks Act with no such prohibition. Although intended to provide more comprehensive regulation than the banking provisions in Section 8, the Interlocks Act stops far short of any blanket prohibition of interlocks among competing financial institutions. Instead, Congress dealt specifically with interlocking relationships between competing depository institutions but not between such institutions and their competitors or borrowers.[28]

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[26] Bank Supervision, Bank Directors and Conflicts of Interest, Hearings on S. 71, S. 73, S. 895 and S. 1433 before the Senate Comm. on Banking, Housing and Urban Affairs, 95th Cong., 1st Sess. (1977).

[27] *Id.* at 278. A Senate staff report, published in 1978, also recommended a sweeping amendment to Section 8 "to prohibit all types of interlocks between actual and potential competitors, and to prohibit interlocks involving actual and potential customers, suppliers and sources of credit or capital." Interlocking Directorates among the Major U.S. Corporations, a Staff Study prepared by the Subcomm. on Reports, Accounting and Management of the Senate Comm. on Governmental Affairs, 281 (Jan. 1978).

[28] Section 205 of the Interlocks Act provides that the prohibitions of Sections 203 and 204 of the Act do not apply to:

[Footnote continued on page 24]

Congress' refusal specifically to prohibit bank/insurance interlocks in the Interlocks Act is particularly strong

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[28] [Continued]

(1) a depository organization that does not do business within the United States except as an incident to its activities outside the United States;

(2) a corporation operating under Section 25 or 25(a) of the Federal Reserve Act ("Edge Corporations" and "Agreement Corporations");

(3) a depository organization that has been placed formally in liquidation, or that is in the hands of a receiver, conservator, or other official exercising a similar function;

(4) a credit union being served by a management official of another credit union;

(5) a state-chartered savings and loan guaranty corporation; or

(6) a Federal Home Loan Bank or any other bank organized solely for the purpose of serving depository institutions (commonly referred to as "bankers' banks") or solely for the purpose of providing securities clearing services and services related thereto for depository institutions, securities companies, or both.

See Regulation L, 12 C.F.R. § 212.4 (1981), issued by the Federal Reserve Board, implementing the Act.

In addition to interlocking relationships specifically permitted by statute, Regulation L exempts a number of organizations from the prohibitions in the Interlocks Act: (1) organizations located in low income areas; (2) minority and women's organizations; (3) newly chartered organizations; (4) organizations facing conditions endangering safety or soundnes; (5) organizations facing disruptive management loss; (6) organizations sponsoring credit unions. In addition, Regulation L affords relief from the prohibitions in certain cases of undue hardship, and also creates an additional exemption for certain grandfathered interlocking relationships pursuant to § 206 of the Interlocks Act. *See* 1 FRRS § 3-825, § 3-823 and § 3-824 (June 1981).

Although the Interlocks Act does not expressly repeal the banking paragraphs of Section 8, the Board of Governors of the Federal Reserve System regards the Interlocks Act as having supplanted the first three paragraphs of Section 8. 12 C.F.R. § 212.7 (1981).

evidence of its understanding that such interlocks are not prohibited by the Clayton Act. As this Court recently observed, when Congress has made " a comprehensive reexamination and significant amendment" of a statutory regulation, as it did in 1977-1978 with respect to interlocking relationships involving banks, and has "left intact the statutory provisions . . . which the federal courts" had construed in a particular way, such congressional action "is itself evidence that Congress affirmatively intended to preserve that" construction. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 102 S. Ct. 1825, 1841 (1982).

Congress' approach to the regulation of interlocking corporate relationships is clear: it is to regulate such relationships selectively, employing different methods for different types of interlocks and leaving many interlocks wholly unregulated. In light of this pattern, it can hardly be surprising that bank-insurance interlocks are not regulated. The legislative intent to continue that state of affairs is confirmed by the numerous occasions on which Congress has rejected proposals for change expressly aimed at bank-insurance interlocks. (Pp. 43-44, *infra.*) The court of appeals' decision, predicated on the mistaken notion that Congress intended to create a comprehensive statutory scheme hostile to interlocking relationships of the type here involved, must be set aside in order to give effect to the congressional determination to preserve this highly selective approach and to retain the requirement of the industrial corporations provision limiting it to "two or more corporations . . . other than banks."

III. THE LEGISLATIVE HISTORY OF SECTION 8 CONFIRMS THE PLAIN MEANING OF THE STATUTE BY SHOWING THAT IT WAS NOT INTENDED TO APPLY TO BANK-INSURANCE INTERLOCKS

Because the court of appeals believed that the district court's normal reading of the "other than banks" requirement of Section 8 would result in an exception to what

it mistakenly perceived as a broad congressional purpose to prohibit all interlocking relationships among competitors, the court of appeals purported to examine the legislative history of Section 8 for "unmistakable evidence" of Congress' intent to confer an exemption for the challenged interlocks. This, of course, was the wrong inquiry. Instead, the legislative history must be read to determine whether it supports the statute's evident plan to treat bank interlocks differently and separately from those involving other corporations.

The history of Section 8 confirms that the phrase "two . . . corporations . . . other than banks" was intended to exclude banks altogether from the coverage of the industrial corporations provision. From initial hearings to final passage, every stage of that history reveals a consistent congressional purpose to treat interlocking relationships involving banks differently, and separately, from those involving other companies. In particular, that history demonstrates that Congress was at all times aware of the existence of interlocking directorates between banks and other business organizations, including insurance companies, but steadfastly declined to broaden the bills it was considering to cover such relationships.

In contrast to the extensive evidence of legislative intent to exclude banks altogether from the industrial corporations provision, the legislative record is devoid of any indication of contrary congressional intent. As the district court recognized,

> . . . there is not one statement by anyone in Congress that supports the Government's argument that the "other than banks" language meant only to exclude bank/bank interlocks but not bank/non-bank interlocks. (Pet. App. 74a.)

The original Clayton Act provisions on interlocks proceeded through four legislative stages: (1) the initial "tentative bill," (2) the subsequent House bill introduced by Congressman Clayton, (3) the Senate amendments,

and (4) the final bill of the Joint Conference Committee, which was enacted into law as the Clayton Act.[29] In brief summary, although the early bills disappointed the proponents of comprehensive interlock legislation because they did not deal with interlocks between banks and other companies, Congress refused to deviate from the scheme reflected in those bills.

1. The "tentative bill" introduced by Congressman Clayton (App. Below, App. C) was prompted by President Wilson's demand for legislation to prohibit director interlocks among "great corporations—banks and railroad, industrial, commercial and public service bodies." H.R. Rep. No. 627, 63d Cong., 2d Sess. 17-18 (1914). Wilson's call for action followed the reports of two congressional investigative committees (popularly known as the "Pujo Committee" and the "Stanley Committee") and a series of magazine articles by Louis Brandeis which revealed the extent of common corporate management among large business organizations and assailed, *inter alia*, director interlocks involving banks and insurance companies and interlocks between banks and their corporate borrowers. (See Pet. App. 65a.)

The "tentative bill" of Congressman Clayton contained three sections on director interlocks involving three distinct classes of business organizations. Section 1 prohibited director and management interlocks between railroads and certain other companies, including banks. Section 2 prohibited director and management interlocks between certain banking organizations. Finally, Section 4 established for other competing corporations a conclusive presumption of a Sherman Act violation based solely on the existence of a director interlock between two such competing corporations.

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[29] These bills and the statute as enacted are reprinted in the Appendix to Petitioners' Appeal Brief ("App. Below"), copies of which have been lodged with the clerk.

At the hearings on the proposed "tentative bill," Presidential advisor Louis Brandeis testified that the provisions of Section 1, the only section regulating mixed interlocks involving companies drawn from dissimilar classes, should "by no means . . . be limited to railroads, but ought to apply to all classes of . . . industrials as well as railroads." Hearings on Trust Legislation Before the House Committee on the Judiciary, 63d Cong., 2d Sess. 681 (1914) ("Trust Hearings"). Brandeis acknowledged that the proposed bill did not prohibit any other such mixed interlocks and that Section 4 applied only to competing "industrial corporations":

> I think, Mr. Carlin, that as you have Section 4 there your clause is limited to a linking together of two industrial corporations who are competitors . . . . *Id.*

Having recognized the limited scope of Section 4, Brandeis urged, as the district court noted (Pet. App. 66a), "that both banks and insurance companies . . . ought to be included in that prohibition" of the bill. *Trust Hearings* at 925. After generally discussing bank interlocks, which he believed should be prohibited, Brandeis stated in full:

> Now, so much for the subject matter of banks to which we should apply it, and that means the banks as to which you would say no person may be a director who is also a director of some other financial concern doing business in the same place. Now, what is a financial concern as I have used the term? I should say that a "financial concern" includes not only a bank which is a member of a national reserve system but any other bank.
>
> Mr. Volstead: Would you include an insurance company?
>
> Mr. Brandeis: And an insurance company also. It seems to me that both banks and insurance companies, which have a usual place of business in the same place, under whatever law they are organized, ought to be included in that prohibition. *Id.*

Mr. Untermyer, counsel for the Pujo Committee, joined in Brandeis' assessment of the proposed tentative bill. In contrasting that bill with one which the Pujo Committee had recommended in order to prohibit, *inter alia*, interlocking directorates between banks and insurance companies,[30] Mr. Untermyer remarked:

> I think there is a grave question as to whether a director in a great life insurance company should be a director in a bank. You have failed to cover that feature. *Id.* at 823.

Thus, even at the first stage of Section 8's legislative history, the proponents of a comprehensive ban on interlocks—on whose broad views the court of appeals relies in attributing to Congress a general purpose to prohibit all interlocks between competitors (Pet. App. 12a-13a, 18a-19a)—acknowledged that the bills under consideration were not as all-encompassing as they wished.[31]

2. Despite the recommendations of both the Pujo Committee and Brandeis, the bill subsequently proposed by Representative Clayton was not modified to include a prohibition of bank/insurance interlocks.

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[30] Section 11 of the Pujo Committee's recommended legislation would have prohibited officer and director interlocks between a national bank and any "bank . . . trust company or other financial or other corporation or institution, whether organized under State or Federal law . . . that is engaged in the business of loaning money . . . ." *Trust Hearings* at 868.

[31] The court of appeals discounted Brandeis' comments on the ground that they refer to the problem of a director's conflict of interest or to the scope of the banking provisions of the Clayton Act. (Pet. App. 25a.) But Brandeis' view that interlocks should be prohibited between banks and insurance companies doing business in the "same place," *supra*, p. 28, suggests that he was concerned about competition between these kinds of entities. The fact that he would have regulated them in the banking provisions does not detract from his conclusion that the then Section 4 applied only to industrial corporations and not banks and that bank/insurance interlocks were not, but should be, prohibited by the bill.

At the conclusion of the Trust Hearings, Representative Clayton introduced a second bill, H.R. 15657, which was ultimately to become the Clayton Act. Section 8 of H.R. 15657 dealt with director interlocks in a manner generally parallel to the same three compartmentalized categories of corporations in the initial tentative Clayton bill. (App. Below, App. D, 33-47.) Thus, the first paragraph prohibited director and management interlocking relationships between common carriers and other companies (both carriers and non-carriers) with which the carriers might do business. Paragraphs two and three prohibited director and management horizontal interlocks among "banks, banking associations, or trust companies." Finally, the fourth paragraph prohibited director interlocks between "two or more corporations . . . other than common carriers." This is the first instance in which the crucial "other than" requirement appears in the industrial corporations provision of Section 8. As the district court observed, no doubt was ever expressed in the legislative debates or reports that the effect of this clause was to exclude common carriers altogether, including both carrier/carrier and carrier/non-carrier interlocks. (Pet. App. 67a. *See infra*, p. 36.) The bill was reported to the House with minor changes not important here.[32]

The Committee report accompanying the second Clayton bill confirmed that the industrial corporations provision would have no application to banks whatsoever:

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[32] The text of H.R. 15657, as reported to the House on May 6, 1914, by the House Judiciary Committee, H.R. Rep. No. 627, 63d Cong., 2d Sess. (1914), is reprinted as App. Below, App. F, 49-65. The minor changes were that the interlocking directorate provisions were renumbered as Section 9; the banking provisions were modified by the addition of three exceptions; and a $1,000,000 size requirement was added to the industrial corporations provision.

> This section is divided into three paragraphs, each of which relates to the particular class of corporations described, and the provisions of each paragraph are limited in their application to the corporations belonging to the class named herein. H.R. Rep. No. 627, 63d Cong., 2d Sess. 18 (1914).

The same point was made in the House debates on H.R. 15657. Thus, at a time when the bill did not include the "other than banks" clause, the question was raised during the congressional debates whether a bank could ever be subject to the industrial corporate provision:

> Mr. Cullop: That [provision] refers to some other corporation than a bank. That does not apply to a bank . . . This has no reference to the banking business, but to other affairs.
>
> Mr. Carlin: That relates to industrial commerce.
>
> Mr. Cullop: Yes. That does not relate to banking. That relates to industrial and commercial corporations, or institutions of that kind, but has no reference whatever to the banking business. 51 Cong. Rec. 9604 (1914).[33]

3. The third stage in the legislative development of Section 8 came in the Senate. After the House had passed H.R. 15657, the bill was referred to the Senate Committee on the Judiciary where it underwent significant changes. Briefly, the Senate Committee entirely eliminated all of the banking provisions in H.R. 15657, revised the common carrier provisions, and left the industrial corporations provision untouched.[34] Thereafter, on Sep-

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[33] The court of appeals tried to minimize the force of Mr. Cullop's statement on the ground that it was made in the context of a debate on the banking provisions and responded to a question concerning the relationship of those provisions to the industrial corporations provision. (Pet. App. 27a.) Since the relationship of those two sets of provisions is at the core of the court of appeals' decision on the scope of the "other than" clause, it is difficult to imagine how any comment could be more pertinent.

[34] The text of H.R. 15657 as sent to the Senate is printed as App. Below, App. F, 67-90. The Senate Committee Report accompanying

tember 2, 1914, the Senate passed its version of the bill as reported from the Senate Committee.

4. This set the stage for development of the fourth and final version of the Clayton bill. Since the House refused to accept the Senate's amendments, the bill went to a Conference Committee where the conferees worked out a compromise, the effect of which was (1) to restore with certain changes the House's banking provisions,[35] (2) to place the common carrier provisions in a separate section of the bill, and (3) to add the words "banks, banking associations, trust companies" to the "other than" requirement in the industrial corporations provisions. S. Doc. No. 585, 63d Cong., 2d Sess. 6 (1914).

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its bill stated that regulation of bank interlocks should be part of the banking laws, confirming that the industrial corporations provision was never intended to reach bank/non-bank interlocks. The following explanation was given for striking out all provisions relating to bank interlocks:

> In proposing this amendment a majority of the Committee believed that such legislation as this more properly belongs to the domain of banking rather than of commerce and such additional regulation of bank directorates as may be wise and just should be made by amendments to the national bank acts, and the enforcement of it given to the Comptroller of the Currency and the Federal Reserve Board. S. Rep. No. 698, 63d Cong., 2d Sess. 48 (1914).

The Senate also deleted "bank or other" from the last paragraph of Section 8, providing for a one-year grace period for compliance, showing once again that the industrial corporations provision would not reach any bank interlock.

[35] As Congressman Sherley, one of the conferees, explained, the House compromised by raising the minimum size requirements for coverage of banks in return for the Senate's restoring the banking provisions. This explanation is quoted in full by the district court (Pet. App. 71a) and noted by the court in pointing out that the Senate, if not the House, would never have agreed to enact Section 8 if it had thought banks were to be regulated by the fourth paragraph as well as in the first three paragraphs. (Pet. App. 74a.)

The impact of the Conference Committee's treatment of the industrial corporations provision, and the meaning of the expanded "other than" clause, became the subject of heated floor debate in the House of Representatives. Congressman Mann raised a point of order against the conferees' addition of "banks, banking associations and trust companies" to the "other than" clause. He objected that the addition of the language relating to banks made a material change in the industrial corporations paragraph and since the House and Senate were not in disagreement on that paragraph, the change was in excess of the conferees' authority. The objection was predicated upon Congressman Mann's belief that prior to the expansion of the "other than" clause, the industrial corporations provision would have prohibited interlocks between mixed categories of corporations, such as bank/nonbank interlocks. 51 Cong. Rec. 16269 (1914). Thus, referring to the House bill *without* the expanded "other than" clause, Congressman Mann stated:

> That applies to a director in a bank and a director in a manufacturing institution. That prohibits a director of a bank with a capital of a million dallars in New York City being also a director in the Sugar Trust Company or in any other company. *Id.* at 16272.

Several congressmen who had more familiarity with the bill immediately pointed out that Congressman Mann's objection was based on an erroneous assumption. Representative Webb, one of the conferees, stated that the industrial corporations provision "was never intended to apply to banks, because we had an express paragraph . . . which took care of interlocking directorates in banks." *Id.* at 16271. Similarly, Congressman Sherley emphasized "that the inclusion by name of banks and trust companies" in the banking provisions of Section 8 "excluded them from the general [industrial corporations] provisions" and that therefore the action of the conferees in expanding the "other than" clause merely accomplished:

> . . . what would have been held as excluded in the bill agreed to in conference even if not put there, to wit, "banks, banking associations and trust companies," thus making it plain . . . that they, along with common carriers, were not within the group outlined as industrial corporations. *Id.* at 16272.

This same point was underscored in another comment made by Congressman Webb in response to Congressman Mann's "point of order" objection. Congressman Webb explained that the banking provisions imposed a $5,000,000 minimum size requirement as to each bank involved in an interlock, whereas, a $1,000,000 minimum size was adopted for industrial corporations. This difference in the minimum size requirements confirmed that the industrial corporations provision was never intended to apply to banks:

> The conference did put in "banks and banking associations" in order to make perfectly clear what in my opinion is already clear; because in the preceding paragraph we had passed a section with reference to interlocking directorates of banks, and there we made the limitation $5,000,000. Now, it would be idiotic to say that we included also banks and banking associations in the paragraph referring to industrial corporations [where the minimum size was only $1,000,000] . . . . Id. at 16271.

Thus, Congressman Webb correctly observed that if Congress were willing to *permit* horizontal bank/bank interlocks between two competing banks with a size up to $5,000,000, it would be "idiotic" to say that Congress intended in the next paragraph to *prohibit* a competing bank/non-bank interlock where the bank's size is only $1,000,000.[36]

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[36] The court of appeals hypothesized that the inclusion of banks in the expanded "other than" clause did not indicate a total exception for banks but was necessary only in order to insure that those bank interlocks which did not meet the minimum threshold size ($5,000,000) and population requirements of the banking provisions

In this posture, the "point of order" objection of Congressman Mann came before the Speaker of the House who sustained the views of Congressmen Webb and Sherley and overruled the objection. The bill was then passed by both Houses and signed by the President on October 15, 1914. App. Below, App. B, 7-27.

The court of appeals discounted the highly significant exchange that followed Congressman Mann's point of order on the technical and irrelevant ground that it was not until after the conferees had responded to his earlier comments that Congressman Mann explicity stated his view that bank/non-bank interlocks had been covered by the fourth paragraph before the amendment of the "other than" clause. (Pet. App. 28a-30a & nn.58-59.) Therefore,

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would not be barred by the industrial corporations provisions which had a lower minimum size requirement ($1,000,000) and no population requirement at all. (Pet. App. 23a.)

One difficulty with this proposition is that it fails to recognize that the minimum size requirements in the banking and industrial corporations provisions are not comparable. The banking provisions measured size on the basis of "*deposits*, capital, surplus and undivided profits" (emphasis added), while the industrial corporations provisions measured size on the basis of "capital, surplus and undivided profits" without any regard to "deposits." Deposits were included in the threshold size requirement of the banking provisions at the suggestion of Louis Brandeis, *Trust Hearings* at 684, because they more accurately reflected the amount of money—"other people's money"—that banks controlled.

Congress' failure to include "deposits" in the minimum size requirement of the industrial corporations provision thus confirms that that provision was intended to have absolutely no application to banks at all. It also shows that the inclusion of banks within the expanded "other than" clause cannot be explained by the need to ensure that bank interlocks permitted by the banking provisions would not run afoul of the industrial corporations provision, as the panel supposed. Thus, a bank with "deposits, capital, surplus and undivided profits" of more than $5,000,000 might or might not have sufficient "capital, surplus and undivided profits"—more than $1,000,000—to be covered by the industrial corporations provision. There is simply no necessary or consistent relationship between the two provisions.

the court reasoned, the conferees' response to his initial comments may have meant only that horizontal bank interlocks had always been excluded from the fourth paragraph because they were specifically dealt with in the banking provisions. However, that grudging view of the exchange cannot be squared with the statements of the conferees. Thus, for example, Congressman Sherley responded to Congressman Mann that "banks, along with common carriers, were not within the group outlined as industrial corporations," and covered by the fourth paragraph. Congressman Sherley's comparison of banks and common carriers is especially significant because no one had ever expressed any doubt that all interlocks involving common carriers were excluded from the industrial corporations provision. In view of the remarks of the conferees, it is inconceivable that the Speaker ruled against Congressman Mann's point of order on any ground other than that Congressman Mann was wrong in believing that the addition of "banks" to the "other than" clause exempted bank/non-bank interlocks that had been previously regulated by that paragraph.[37]

In any event, both Congressman Mann and the conferees agreed that the effect of the explicit addition of "banks" to the "other than" clause was "to eliminate from this section *all banking corporations*," 51 Cong. Rec. 16269 (1914) (emphasis added)—whether by a material change or by mere confirmation of what was already implicit in the bill.

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[37] In stressing this critical colloquy, petitioners do not, as the court of appeals mistakenly assumed (Pet. App. 28a-30a), seek to rely on the characterization of a bill by one of its opponents. *See* NLRB v. Fruit & Vegetable Packers, 377 U.S. 58, 66 (1964). We do not rely on Congressman Mann. (He was clearly wrong, for example, when he said that before its amendment, the fourth paragraph would have prohibited an interlock between a bank and "the Sugar Trust Company." (P. 33 *supra*.) Banks and sugar companies are not competitors.) Rather, petitioners rely on the statements which the bill's proponents—the conferees—made in response to

The majority opinion simply glosses over the detailed legislative history which both Judge Peckham and Judge Kennedy found so persuasive. Instead, the court below turned to what was acknowledged to be "less direct evidence" of congressional intent, such as a speech to Congress by President Wilson, and the Democratic Party's 1912 campaign platform—both of which preceded the introduction of even the tentative Clayton bill [38]—and divined from them a general legislative purpose to enact a general prohibition of all interlocks among competitors.[39] Contrary to the proper method of statutory interpretation, it then used this perceived general legislative purpose to explain away or discount every element of direct evidence of a contrary legislative intent.

Inevitably, the conclusion which the court of appeals reached leads to a number of inconsistent and anomalous results. The sweeping statements by President Wilson and others, cited in support of the panel's position, called for the prohibition of a wide variety of interlocking relationships that are obviously not prohibited by the Clayton Act, including not only director interlocks but other per-

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Congressman Mann in which they pointed out that all bank interlocks were impliedly excluded from the fourth paragraph even before the conferees' addition of "banks" to the "other than" clause made that exclusion explicit.

[38] No specific legislation accompanied President Wilson's message to Congress.

[39] In support of its position, the court of appeals also relies on general statements in the various House, Senate and Conference reports attending passage of the Clayton Act to the effect that Congress sought to carry out the recommendation of President Wilson. S. Rep. No. 698, 63d Cong., 2d Sess. 1 (1914), cited at Pet. App. 11a n.11; and H.R. Rep. No. 627 at 18, cited at Pet. App. 14a. Not surprisingly, the Democratic Congress claimed that it was carrying out the recommendation of a Democratic President. As indicated below, however, although the Act did accomplish some of Wilson's sweeping recommendations, a number of others were not carried out. *See* nn.40-44, *infra*.

sonnel interlocks among all competing common carriers,[40] interlocks among potentially competing financial institutions,[41] vertical interlocks between banks and borrowers,[42] vertical interlocks between buyers and sellers [43] and interlocks between state banks.[44] There is much less evidence of any specific congressional intent to "exempt" these interlocks from the reach of the Clayton Act than there is evidence of an intent to "except" the bank/non-bank interlocks of the sort at issue here.

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[40] *See, e.g.*, President Wilson's January 20, 1914 speech to Congress, cited by the Court of Appeals at Pet. App. 12a, which called

> for laws which will effectually prohibit and prevent such interlockings of the *personnel* of the directorates of great corporations—banks and railroads, industrial, commercial, and public service bodies—as in effect result in making those who borrow and those who lend practically one and the same, those who sell and those who buy but the same persons trading with one another under different names and in different combinations, and *those who affect to compete in fact partners and masters of some whole field of business.* (Emphasis in opinion below.)

Samuel Untermyer, counsel to the Pujo Committee, criticized the "tentative" Clayton bill because it did not reach interlocking stockholding and other forms of indirect domination. *Trust Hearings* at 816, 818, 829-832.

[41] *See, e.g.*, the Pujo Committee Report, cited by court of appeals at App. Pet. 12a, recommended that "interlocking directorates in potentially competing financial institutions be abolished and prohibited." Mr. Untermyer criticized the tentative Clayton bill for not reaching interlocks between potential competitors. *Trust Hearings* at 818-820.

[42] *See* n. 40, *supra*.

[43] *See* n. 40, *supra*.

[44] Brandeis, *Serve One Master Only!*, Harper's Weekly, Dec. 13, 1913, at 10, criticized the Pujo Committee's recommended legislation prohibiting interlocks between potentially competing financial institutions because it did not apply to state banks and "potentially competing corporations whatever the class—life insurance companies, railroads and industrial companies" and was not stringent enough in its application to national banks.

By fixing its focus so intently on what it perceived to be a general congressional prohibition of interlocks in the Clayton Act, the court of appeals lost sight of the purpose of the "other than" clause it was asked to construe. As the dissent noted, the majority ignored the point that "the purpose of the statutory exception obviously was to narrow the range of its coverage with respect to interlocks involving banks" (Pet. App. 49a), many of which, as noted above, are not covered by the banking provisions. Ironically, the panel's majority decision subjects bank/non-bank interlocks to a blanket prohibition while many comparable bank/bank interlocks are left unregulated.

IV. SIXTY YEARS OF CONSISTENT ADMINISTRATIVE AND CONGRESSIONAL INTERPRETATION CONFIRM THAT BANK/NON-BANK INTERLOCKS FALL OUTSIDE THE SCOPE OF SECTION 8

Ever since the passage of the Clayton Act in 1914, Congress, the pertinent enforcement and regulatory agencies and the nation's business community have all understood that Section 8 does not apply to interlocks between banks and corporations other than banks. Until these companion cases were filed in 1975, this was the consistent interpretation of the statute by antitrust enforcement agencies and congressional committees. Moreover, Congress repeatedly amended the banking provisions of Section 8 without applying them to interlocks between banks and other financial institutions and repeatedly rejected other proposed legislation that would have regulated such interlocks, including, specifically, interlocks with insurance companies.

In its comprehensive 1950 Report on interlocking directorates, the Federal Trade Commission left no doubt as to its understanding that the Clayton Act did not prohibit interlocking relationship between banks and other companies:

> The Clayton Act's two sections dealing with interlocking directorates embody three different rules of

> law applicable to different classes of corporations. One rule [in the fourth paragraph of Section 8] governs corporations engaged in commerce which are neither banks, banking associations, trust companies, nor common carriers . . . .
>
> . . . [T]he rule [for industrial corporations] . . . leaves unchallenged interlocking directorates between corporations, both large and small, that have not been competitors in the past but might become so in the future; between corporations that are related to each other as seller and buyer; and *between industrial and commercial corporations and financial institutions.* H.R. Doc. No. 652, 81st Cong., 2d Sess. 10 (1950) *The Report of the Federal Trade Commission on Interlocking Directorates* (emphasis added).[45]

At the time these cases were brought, the Federal Trade Commission had never challenged any bank/non-bank interlock or disagreed with the conclusions of its 1950 study.[46] The Department of Justice obviously shared this view until 1975 because it, too, had brought no Section 8 suits involving banks.[47] In view of the extent and promi-

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[45] *See also* Hearings on Corporation Disclosure Before the Subcomm. on Budgeting, Management, and Expenditures and the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations, 93d Cong., 2d Sess., Part 2, 900-01 (1974) (Testimony of FTC Chairman Engman).

[46] Subsequent to the filing of these cases, the Federal Trade Commission brought an action under Section 5 of the Federal Trade Commission Act, and not Section 8 of the Clayton Act, challenging common directors of a bank and a savings and loan association as an unfair trade practice. Following legislation exempting savings and loan associations from the jurisdiction of the FTC, the action was ultimately vacated. In re Perpetual Fed. Savings & Loan Ass'n, 90 F.T.C. 608 (1977), *vacated*, 94 F.T.C. 401 (1979).

[47] Since interlocks forbidden by Section 8 are generally a matter of public record, directors ignore the statute at obvious peril. Thus, the statute is self-executing in most cases. The Department's failure for over 60 years to challenge bank/insurance interlocks—as it did in the few other interlock cases where compliance was not voluntary

nence of bank/insurance director interlocks,[48] the conspicuous failure of either federal antitrust enforcement agency to challenge the practice for more than 60 years is eloquent evidence of the Government's own contemporaneous understanding of the scope of Section 8 of the Clayton Act. As stated in *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 352 (1941).

> But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred."

See also FPC v. Panhandle Eastern Pipe Line Co., 337 U.S. 498, 513 (1949) ("Failure to use such an important power for so long a time indicates" a belief that the power did not exist); *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-73 (1915) ("Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. . . . [I]n determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation").

—was, therefore, official policy and not a failure to focus enforcement efforts on Section 8. Indeed, as recently as mid-1974, shortly before this case was filed, Thomas Kauper, Assistant Attorney General for Antitrust, spoke publicly about the interlock problem concerning "the role of financial institutions and insurance companies," but went on to observe that the "Clayton Act section dealing with interlocks may not be directly applicable" and that "as a result, it may be more on [sic] a legislative problem than an enforcement problem at the moment," American Metal Market, Vol. 81, No. 137 (July 16, 1974).

[48] A partial list of congressional and administrative studies chronicling, *inter alia*, bank insurance interlocks is set forth in App. Below, App. I, 95-96.

This longstanding administrative view of the scope of Section 8 is buttressed by the statements and actions of Congress. Thus, a Staff Report to the Antitrust Subcommittee of the House Judiciary Committee entitled "Interlocks in Corporate Management" (1965),[49] observed that there is

> no prohibition in the statute against . . . either vertical or horizontal, direct or indirect, interlocks between the banking organizations and other types of corporations. *Id.* at 25.

More specifically, with respect to "industrial and commercial corporations," the statute "does [not] apply to interlocks with banks, banking associations or trust companies." *Id.* at 26. Likewise, in 1968, a Staff Report for the Subcommittee on Domestic Finance of the House Committee on Banking and Currency, 90th Cong., 2d Sess. (transmitted by Chairman Patman to Attorney General Clark July 9, 1968) specifically noted the inapplicability of Section 8 to bank/insurance company interlocks and advocated legislation to prohibit them:

> The Law [Section 8 of the Clayton Act] also does not apply to interlocks between commercial banks and competing financial institutions, such as mutual savings banks, insurance companies, and small loan companies.[50]

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[49] Staff of House Comm. on the Judiciary (Antitrust Subcomm.), 89th Cong., 1st Sess., Report on Interlocks in Corporate Management (Comm. Print 1965).

[50] Staff of the Subcomm. on Domestic Finance of the House Comm. on Banking and Currency, 90th Cong., 1st Sess., Control of Commercial Banks and Interlocks Among Financial Institutions (Subcomm. Print 1967) as reprinted in Staff of the House Comm. on Banking and Currency, 90th Cong., 2d Sess., I Report on Commercial Banks and their Trust Activities: Emerging Influence on the American Economy 881, 925-26 (Subcomm. Print 1968).

See also Letter from Rep. Wright Patman to Hon. Arthur F. Burns (June 1, 1970), reprinted in the Banking Reform Act of 1971: Hearings on H.R. 5700 Before the House Committee on

Rather than consider these important sources of contemporaneous interpretation of the meaning of the statute, the court of appeals simply brushed them aside as unsupported by "analysis" because their conclusions conflicted with the panel majority's own largely *a priori* conclusion as to the scope of Section 8. (Pet. App. 30a).

Bills modifying Section 8 to expand its coverage to ininclude interlocks of the sort challenged here have been offered regularly in Congress.[51] All were rejected, except that, in 1933, Congress did add a new Section 8A

Banking and Currency, 92d Cong., 1st Sess. 270, 271 (1971) (Section 8 "does not apply to interlocks between commercial banks and competing financial institutions, such as mutual savings banks, insurance companies, and small loan companies"); Staff of the Subcomm. Domestic Finance of the House Comm. on Banking and Currency, 90th Cong., 1st Sess., Control of Commercial Banks and Interlocks Among Financial Institutions (Subcomm. Print 1967), reprinted in Staff of House Comm. on Banking and Currency, 90th Cong., 2d Sess., I Report on Commercial Banks and Their Trust Activities: Emerging Influence on the American Economy 881, 921 (Subcomm. Print 1968):

> the law also does not apply to interlocks between commercial banks and competing financial institutions, such as mutual savings banks, insurance companies and small loan companies.

[51] H.R. 11572, 89th Cong., 1st Sess. (1965); H.R. 2509, 90th Cong., 1st Sess. (1967); H.R. 2346, 91st Cong., 1st Sess. (1969); H.R. 3245, 92d Cong., 1st Sess. (1971); H.R. 5700, 92d Cong., 1st Sess. (1971); H.R. 13581, 93d Cong., 2d Sess. (1974); H.R. 14997, 93d Cong., 2d Sess. (1974); H.R. 4406, 94th Cong., 1st Sess. (1975). Each of these bills was patterned after H.R. 11572, which would have amended Section 8 of the Clayton Act by abolishing the three separate classes of organizations now covered by Sections 8 and 10. Instead, each bill would have prohibited director, officer or management-employee interlocks, as well as interlocks effectuated through representatives or nominees of these persons, between *inter alia*: (a) actual or potential competitors or (b) actual or potential customers, suppliers or sources of credit or capital. The bill would have taken precedence over the McCarran-Ferguson Act (15 U.S.C. §§ 1011-1015) and would have been controlling, to the extent of any inconsistencies, over much of the miscellaneous federal interlock legislation not specifically repealed.

to the Clayton Act, which prohibited interlocking relationships between banks and other corporations that made "loans secured by stock or bond collateral to any individual, association, partnership, or corporation other than its own subsidiaries."[52] The new section was, however, repealed two years later[53] with, the district court noted, "the specific intention of eliminating the prohibition against interlocking directorates among banks and institutions with which they competed in making loans." (Pet. App. 60a).

Although the views of subsequent Congresses as to the meaning of prior legislation are not to be relied upon unduly, they are to be considered if any doubt remains after analyzing the specific statutory language and legislative history at issue. *See Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980), *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980). Indeed, when, as the court of appeals found (mistakenly) here, the specific intent of the enacting Congress is obscure, the views of subsequent Congresses "are entitled to significant weight." *Seatrain Shipbuilding Corp. v. Shell Oil Co., supra.* Nevertheless, the court of appeals completely discounted all such evidence of Congress' interpretation of the meaning of Section 8 on the ground that the subsequent legislation in question would have prohibited interlocks in addition to those between competing banks and non-banks. (Pet. App. 31a-32a). However, the panel did not dispute that interlocks between banks and other institutions with which they competed would have been prohibited by that legislation so that there would have been no need for that legislation to prohibit such interlocks if they had already been covered by Section 8.

A further indication of Congress' understanding of the scope of Section 8 is the fact that Congress has repeatedly

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[52] Act of June 16, 1933, Pub. L. No. 66, ch. 89, § 33, 48 Stat. 162, 194.

[53] Act of August 23, 1935, Pub. L. No. 305, ch. 614, § 329, 49 Stat. 684, 717.

modified the banking provisions of Section 8 whenever it has felt a need to amend the statute's treatment of interlocking relationships involving a bank. And, in so doing, it has demonstrated a consistent willingness both to narrow the initial prohibitions enacted in 1914 (which were inapplicable to the interlocks at issue here) and to broaden the exemptions.[54] Further, each of these amendments re-

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[54] The 1916 amendment (the "Kern amendment") (Act of May 15, 1916, Pub. L. No. 75, c. 120, 39 Stat. 121) loosened the prohibition of the original statute by permitting any officer, director, or employee of any member bank or a Class A director of a Federal Reserve bank to be a member of two banking directorates in the same community and a director of one bank in some other community providing there was no substantial competition between any of those banks. In addition, the Kern amendment imposed upon the Federal Reserve Board responsibility for administering and enforcing these provisions of Section 8.

The 1920 amendment (Act of May 26, 1920, Pub. L. No. 225, c. 206, 41 Stat. 626) extended the 1916 amendment to apply to private bankers.

The 1928 amendment (Act of March 9, 1928, Pub. L. No. 120, c. 165, 45 Stat. 253) permitted the Federal Reserve Board to permit interlocks between competing banks by deleting at the end of the proviso the phrase "if such other banking association or trust company is not in substantial competition with such bankers or member bank" and substituting in lieu thereof the following:

> . . . if in any such case there is in force a permit therefor issued by the Federal Reserve Board; and the Federal Reserve Board is authorized to issue such permit if in its judgment it is not incompatible with the public interest and to revoke any such permit whenever it finds, after reasonable notice and opportunity to be heard, that the public interest requires its revocation.

The "substantial competition" standard was eliminated because in many instances noncompeting financial institutions declined to expand into potentially competitive areas rather than risk the loss of a valuable director. As the House Report stated, "the law penalizes the growth of competition." H.R. Rep. No. 487, 70th Cong., 1st Sess. 2 (1928). Since Section 8 does not prohibit certain bank/bank interlocks, even if those banks are competitors, it seems very unlikely that Congress would have intended to outlaw all interlocks between competing banks and non-banks.

The 1929 amendment (Act of March 2, 1929, Pub. L. No. 1007, c. 581, 45 Stat. 1536) loosened the restrictions of the banking

flects Congress' understanding that special considerations apply to the regulation of interlocking relationships involving banks and that these problems are not to be subsumed under the general provisions of the statute applicable to industrial corporations. Moreover, the frequency of these amendments indicates that Congress has exercised continual vigilance in this area and would have expressly prohibited interlocking relationships between banks and insurance companies had it desired to bring such relationships within the scope of Section 8.

For more than sixty years, administrative enforcement and regulatory agencies and Congress understood that Section 8 did not apply to interlocks between banks and other companies, including those with which they competed. There is no reason to alter that understanding now.

V. THE BANK HOLDING INTERLOCKS ARE NOT PROHIBITED BY SECTION 8

The bank holding interlocks involve a common director shared by a bank holding company and an insurance company. In the stipulated record, the Government conceded that no bank holding company defendant, in its own operations, competes with an insurance defendant, and hence the requirement in Section 8 that the interlocked corporations must be "competitors" can be satisfied in this case

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provisions by amending the first proviso of the second paragraph of Section 8 of the Clayton Act to read:

> Provided, that nothing in this section shall apply to mutual savings banks not having a capital stock represented by shares, *to jointstock land banks organized under the provisions of the Federal Farm Loan Act, or to other banking institutions which do no commercial banking business.* (New matter italicized.)

In 1935, Congress once again restricted the scope of the banking provisions of Section 8 by replacing the existing provisions with the three paragraphs that are found in the statute today, including the seven specifically enumerated exceptions to the statute's basic prohibitions.

only if the commercial operations of each holding company's bank subsidiary can be attributed to the holding company.

If the Court agrees with petitioners that bank/nonbank interlocks are not prohibited by Section 8, then, as the district court held (p. 7, *supra*), the Government's vicarious attribution theory would also require attributing to the bank holding companies the legal status of the banks as being outside the reach of Section 8. The Government has never seriously argued the contrary.

However, even if the Court finds that the challenged bank interlocks are prohibited, there is nothing in the record of this case to justify prohibiting the bank holding interlocks as well. In the 68 years since Section 8 was enacted, no court has ever held that an indirect interlock between parent companies whose subsidiaries compete is prohibited by the industrial corporations provision of Section 8. *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1195 (2d Cir. 1978); *United States v. Cleveland Trust Co.*, 392 F. Supp. 699 (N.D. Ohio 1974), *aff'd mem.*, 513 F.2d 633 (6th Cir. 1975); *Paramount Pictures Corp. v. Baldwin-Montrose Chemical Co.*, 1966 Trade Cas. ¶ 71,678 (S.D.N.Y. 1966); *United States v. Sears, Roebuck & Co.*, 165 F. Supp. 356 (S.D.N.Y. 1958)[55]

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[55] In *Kennecott Copper*, the court flatly rejected this contention and reserved decision on the issue of whether the statute would cover a parent corporation that closely controls and dictates the policies of its subsidiary, 584 F.2d at 1205. In *Paramount Pictures*, the court stated that the business operations of any "[s]ubsidiary or parent corporations of those [directly interlocked] corporations . . . *are not to be considered* in determining whether competition exists between the directed corporations." 1966 Trade Cas. ¶ 71,678 at 82,065 (emphasis addde). In *Sears*, the court considered an application, under a previously entered decree, to allow participation in a form of indirect interlocks. The court stated that Section 8 of the Clayton Act "by its terms is applicable [only] to directors of corporations engaged in competition." 165 F. Supp. at 358. The court nonetheless denied the application because the decree's broad

The understanding of the courts that Section 8 does not apply to or does not reach indirect interlocks has been accepted both by congressional bodies and the Federal Trade Commission.[56] Moreover, when Congress wanted to regulate an indirect interlock, it used specific language to do so, as illustrated by the interlock provisions in the Panama Canal Act of 1912.[57] In the majority opinion below these prior judicial, congressional and administrative determinations were all brushed aside in footnotes.[58]

The court of appeals proceeded to the conclusion that the bank holding companies here are competitors of the insurance companies, first on the ground that the stipulated record establishes "that in this case the parent bank holding companies control their bank subsidiaries in fact" and second, that the Bank Holding Company Act, 12 U.S.C. § 1841(a), "establishes a conclusive presumption of control" if the holding company has voting power over

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prohibition was "not limited to the language of Section 8," and instead was intended to reach any participation in the Sears business, "whether direct or indirect." *Id.*

In *In re Borg-Warner Corp.*, F.T.C. Dkt. No. 9120, Initial Decision, slip op. (June 30, 1980), however, the administrative law judge ruled that Section 8 applies where the parent company controls the policies of the subsidiary.

[56] Staff of House Comm. on the Judiciary (Antitrust Subcomm.), 89th Cong., 1st Sess., Report on Interlocks in Corporate Management 26 (Comm. Print. 1965) ("indirect interlocks . . . are not covered" under Section 8). *See also* H.R. 11572, 89th Cong., 1st Sess. (1965); The Report of the Federal Trade Commission on Interlocking Directorates, H.R. Doc. No. 652, 81st Cong., 2d Sess. 10, 14-15 (1950) ("The present law . . . is applicable only to direct interlocks among competitors . . . [and] does not encompass indirect interlocks, whatever may be their character and significance.")

[57] Section 11 of the Panama Canal Act amended Section 5 of the Interstate Commerce Act to prohibit certain interlocks by "stock ownership or otherwise, either directly, indirectly, [or] through any holding company . . . ." 49 U.S.C. § 11343 (Supp. IV 1980).

[58] Pet. App. 40a nn.80 and 81.

25% of the bank's voting securities and controls the election of the majority of its directors.[59]

The court was wrong in both respects. The stipulated record established merely that each bank holding company controls its subsidiary "through its ownership of the stock and election of all of the directors" of the subsidiary, but in the very next sentence of the stipulation the Government agreed that the directors of each *bank subsidiary* "manage the bank and select the officers who control the operations and activities" of the bank. These stipulations fall far short of providing any basis on which to conclude that a parent and subsidiary are to be treated as a single enterprise. As this Court has observed, treating a parent and its subsidiaries as a single enterprise depends on both "common ownership *and control*" [60] of the operations of the subsidiaries. In this case, the stipulated record effectively establishes that the directors of each *bank subsidiary* select the bank's officers who in turn control the commercial operations of the bank.

Moreover, the lower court's reliance upon a "presumption" of control in the definition of a bank holding company in the Bank Holding Company Act is misplaced. The statute's definition of a bank holding company as a company which controls a bank does not purport to establish a universal presumption of control sufficient to attribute a bank's activities to its parent holding company in every instance. Rather, it is simply a way to identify those holding companies which Congress wished to regulate in the statute. Thus, notwithstanding the definition of a bank holding company as a company that "controls" a bank, the statute specifically excepts various types of companies that own or control banks from the definition of a bank

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[59] Pet. App. 39a-39a.

[60] *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947). *Cf. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 215 (1951).

holding company. *See* 12 U.S.C. § 1841(a)(5). And, courts have frequently refused to pierce the corporate veil between a bank and its related bank holding company, as defined by the statutes, so as to consider them a unitary enterprise, as did the court of appeals below. *See South Dakota v. National Bank of South Dakota, Sioux Falls*, 335 F.2d 441 (8th Cir. 1964), *cert. denied*, 379 U.S. 970 (1965); *First National Bank in Billings v. First Bank Stock Corp.*, 306 F.2d 937 (9th Cir. 1962); *Leuthold v. Camp*, 273 F. Supp. 695 (D. Mont. 1967), *aff'd per curiam*, 405 F.2d 499 (9th Cir. 1969). In this case, the stipulated record provides no basis for finding that the "realities" of the bank's commercial operations are under the control of the directors of the bank holding companies.

Accordingly, none of the Government's theories supports the attack upon the bank holding interlocks.

CONCLUSION

The judgment of the court of appeals should be reversed.

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APPENDIX

LIST OF PARTIES AND THEIR CORPORATE AFFILIATES

In accordance with Rule 28.1 of the Rules of the Supreme Court, there is set forth below, with respect to each party, a list of its subsidiaries and affiliates, with the exception of those subsidiaries in which all of the shares (or, in some instances, all shares except directors' qualifying shares) are owned by the parent company and those companies in which the party's holdings are less than forty percent of the outstanding shares. The parent of each bank defendant is its bank holding company, which is also a defendant herein. Midland Bank plc, through a wholly-owned subsidiary, owns more than 50% of the stock of Crocker National Corporation. The remaining corporate defendants have no parent companies.

BANKAMERICA CORPORATION AND BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION:

Decimus Computer Leasing Corporation
Decimus Corporation
BA Lepanto Building Corporation
Banca D'America e D'Italia
Finabai-Societe Financiere S.A.
Banco Colombo Americano
Banco International S.A.
BA Finance Corporation (Philippines)
BA (Australia) Limited
BankAmerica Representacao e Servicos Limitada
Corporacion Financiera Asociada S.A.
Financial Group of Kuwait
Jamaican American Merchant Bankers Ltd.
Ouvidor Industria e Comercio Limitada
MISR America International Bank S.A.E.
Savannah Bank of Nigeria Ltd.

First Indo Leasing Co.
Arrendadora Comermex S.A.

BANKERS TRUST NEW YORK CORPORATION AND BANKERS TRUST COMPANY:

Petroquimica del Atlantico S.A.
Private Export Funding Corporation
United Bank for Africa, Ltd.
Banque de Tunisie
Banque du Benelux S.A.
Thai Investment & Securities Co. Ltd.
Anscor Capital & Investment Corp.
Dole Philippines Inc.
Tun Thamrong Company Ltd.
BT Capital Corporation
UBAF Arab American Bank

CROCKER NATIONAL BANK AND CROCKER NATIONAL CORPORATION

Adela Investment Corporation S.A.
Crocker Servicos Limitada
Private Export Funding Corporation
Banque de Paris et des Pays Bas (Zaire)
Asia European American Development Corporation
P.T. Mutual International Finance Corporation

The following companies are affiliates of Crocker National Bank and Crocker National Corporation as subsidiaries of Midland Bank plc which, through a wholly-owned subsidiary, owns more than 50% of the stock of Crocker National Corporation:

Administration Services SA
Albiag Beteilingungs AG
Amvai Holdings SA
Anfin BV
AVGS Rentals Ltd.
Avis Car Leasing Ltd.

BCT Midland Bank SA
British Overseas Engineering and Credit Company
Bullion Merchants of South Africa Ltd.
Burkhardt und Co. Grundstucks KG
Caergwrle Investments (Properties) Ltd.
Club 24 Ltd.
Cobana Holding SA
Comfina AG
Compagnie Francaise de Developpement du Commerce Exterieur SA
Condiama Ltd.
Contransport AG
Cossale Properties Ltd.
Cowle Financial Services Ltd.
CR Bailey (Belfast) Ltd.
CREDEX Aussenhandels GmbH
CREDEX (Bermuda) Ltd.
CREDEX Export—Creditbank GmbH
CREDEX (Lausanne) SA
CREDEX (UK) Finance Ltd.
CSO Valuations Proprietary Ltd.
Detisa Holding SA
Drake America Corporation
Drake (UK) International Ltd.
Draymont Securities Ltd.
Ermonti Corporation
Establishment Murban
Establissement Valentine
Euro Dollar Credits Ltd.
Export Credit Corporation
Featherlite Plastics Ltd.
Fermat Investment Corporation Ltd.
Fiat Finance Ltd.
Financement de la Promotion Immobilliere SA (FIPROMI)
Forward Oversea Credit Ltd.
GBF Gesellschaft fur Beteiligungen und Finanzvermittlung mbH

Gesellschaft fur Industrielle Beteiligungen und Finanzierungen mbH
Gesico International SA
Glastry Brick Company Ltd.
Grandstand Tribunes Inc.
Grandstand Tribunes Hire Ltd.
Grandstand Tribunes Manufacturing Ltd.
Grandstand Tribunes Ltd.
Groupement du Checque de Voyage Francais—Francheque
Grundstuckgesellschaft Linenallee mbH
Grundstuckgesellschaft Trinkausstrasse Kommanditgesellschaft
Grundstuckgesellschaft Trinkausstrasse mbH
Guyerzeller Zurmont Bank AG
Guymont Services SA
Hong Kong and Shanghai Thomas Cook Ltd.
Hubertus Investment Ltd, Inc.
International Renting and Investment Corporation
Isevana Holding SA
JG Mooney and Company Ltd.
JH Vogeler GmbH and Co KG
Joseph Parks and Sons Ltd.
LACIM SA
LAFCO Netherlands BV
LAFCO (Western Hemisphere) Ltd.
LAMCO Netherlands BV
Leverton (FT) Finance Ltd.
London American Export Finance Ltd.
London American Finance Corporation Limited
London American International Corporation Limited
London American Marketing Corporation Ltd.
Lurbo Ltd.
Lurgan Boxmaking Company Ltd.
Machinery and Engineering Corporation SAH
MAIBL Leasing Ltd.
MAIBL Nominees Ltd.
Mansell Bonded Fabrics Ltd.

Markt Holdings Antiles NV
Markt Holdings Europe BV
Markt (UK) Ltd.
Merpret Holding SA 81. Meritor Investments Ltd.
Meritor Investments Ltd.
MH Shipping Company
Midland and International Banks PLC
Midland-ICL Leasing Ltd.
Midland Montagu Administracao E Participacoe Ltda
Midland Montagu Medical Leasing Ltd.
MLH Consulting Group Ltd.
Montebello AG
Morland Shipping Company
Mount Trading Ltd.
Mythen Holding AG
Naim Trust Ltd.
Nixdorf Computer Rentals Ltd.
Northern Ireland Vehicle Leasing Ltd.
Nova Weigh Ltd.
OUB/Montagu Investment Management Ltd.
Partnership Trust SA
Revas Revisions and Verwaltungsgesellschaft AG
Richmond Finance Ltd.
Rotar Betellungs und Finanzierungs AG
Rydewell Suspensions Ltd.
Samuel Montagu (Hong Kong) Ltd.
Scalesdrene Ltd.
Semesta SA
Servco Europe Ltd.
Sima Holdings SA
Sociedade Ultramarina Ltda (Sulta)
Societe de Placements Mobiliers et Immobiliers SA
Societe Francaise d' Acquisition et de Realisations Immobilieres SEC (SOFARI)
Societe Immobiliere Jean-Pierre SA
Societe Immobiliere Rue Charles Galland 12
Sovalet AG
TB (Holdings) Ltd.

Tempus Management Company AG
TGS Vermogensverwalterungsgesellschaft mbH
Thomas Cook al Rajhl (Private) Ltd.
Thomas Cook al Rostamani (Private) Ltd.
Thomas Cook Kuwait Travel and Tourism Company WLL
Thomas Cook (Philippines) Inc.
Thomas Cook SDN BHD
Thomas Cook Travco WLL
Tisadep Ag
Todi-Immobilien Ag
Tokyo Joint Venture
TP (Holdings) Ltd.
Trinkaus und Burkhardt KG
Trinkaus and Burkhardt Immobilien GmbH
Trinkaus und Burkhardt (International) SA
Trinkaus und Burkhardt (Schweiz) AG
Tririding Finance Ltd.
Tubular Barriers Ltd.
Tyrone Brick (Holdings) Ltd.
Tyrone Brick Ltd.
Tyrone Poroton Holdings Ltd.
Vadep Holding Ag
Verwaltungsgesellschaft fur Vermogen und Beteiligungen mbH
Viobureu Ag
Wales and Western Properties Ltd.
Wefinvest Ag
Williams Travel Ltd.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

Equico Lessors, Inc.

METROPOLITAN LIFE INSURANCE COMPANY

Transatlantic Reinsurance Company
National Electronic Information
E.T. Barwick Industries, Inc.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

None

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

Bache Halsey Stuart Shields, Inc.
Bache Halsey Stuart (London) Ltd.
Bache Halsey Stuart Shields (France) S.A.
Bache Halsey Stuart Commodities S.A.
Bache Halsey Stuart (Hong Kong) Ltd.
Bache Halsey Stuart (U.K.)
Sony Prudential Life Insurance Company
Essex St. Syndicate, Inc.
John St. Syndicate, Inc.

Brief for the United States

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OCTOBER TERM, 1982

BANKAMERICA CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether interlocking directorates linking major banks and their parent holding companies with insurance companies that compete directly with the banks are exempt from Section 8 of the Clayton Act, 15 U.S.C. 19, which prohibits interlocking directorates among large competing corporations.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 656 F.2d 428. The opinion of the district court (Pet. App. 51a-85a) is reported at 422 F. Supp. 686.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 1981, and a petition for rehearing and suggestion for rehearing en banc were denied on November 10, 1981 (Pet. App. 86a-87a). The petition for a writ of certiorari was filed on February 8, 1982, and was granted on June 1, 1982. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 8 of the Clayton Act, 15 U.S.C. 19, restricts horizontal interlocks among corporate personnel. With certain specified exceptions, the first three paragraphs of

Section 8 prohibit interlocks between banks, banking associations, savings banks, and trust companies. The fourth paragraph of Section 8 contains a general prohibition that, in pertinent part, states the following:

> No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

Section 8, as originally enacted and as currently in effect, is reproduced in its entirety as an appendix to this brief. Appendix *infra*.

STATEMENT

1. Subject to certain exceptions, the fourth paragraph of Section 8 of the Clayton Act, 15 U.S.C. 19, prohibits interlocking directorates between two or more corporations engaged in whole or in part in commerce, if any one of them has capital, surplus, and undivided profits aggregating more than $1 million, and if the corporations "are or shall have been, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of the antitrust laws." In October 1975, the United States filed two civil complaints in the United States District Court for the Northern District of California, alleging that interlocking directorates linking three major banks and their parent holding companies with four major insurance companies violated this provision of Section 8 of the Clayton Act.

The complaint in *United States* v. *Crocker National Corp.* (J.A. 11-20) alleged that three directors of the Crocker National Corporation, a bank holding company, and its wholly owned subsidiary, Crocker National Bank, also served as directors of either the Equitable Life Assurance Society of the United States, the Metropolitan Life Insurance Company, or the Mutual Life Insurance Company of New York (MONY) (J.A. 13-14). The complaint in *United States* v. *BankAmerica Corp.* (J.A. 47-55) alleged that, until shortly before the filing of the complaint, a director of BankAmerica Corporation, a bank holding company, and its wholly owned subsidiary, Bank of America National Trust and Savings Association, also served as a director of Prudential Life Insurance Company (J.A. 49-50). This director resigned from the boards of the bank and bank holding company after the government notified him of its intent to file the complaint (J.A. 63). The complaint also alleged that a director of Bankers Trust New York Corporation, a bank holding company, and its wholly owned subsidary, Bankers Trust Company, served as a director of Prudential Life Insurance Company (J.A. 50). Both the interlocked corporations and the individual directors were named as defendants.[1]

The parties filed substantially similar stipulations of fact in the two cases (J.A. 21-32, 56-67). In those stipulations, petitioners admitted that the bank holding companies control their wholly owned subsidiary banks by and through ownership of stock and election of all of their directors (J.A. 26, 61, 62), that interlocking directorates linked the banks and their holding companies with one or more insurance companies (J.A. 27-28, 63), and that each

[1] The individual defendant who served as a director of the Crocker National Corporation, Crocker Bank, and Equitable agreed to a consent judgment requiring him to resign either from the boards of Crocker National and Crocker Bank or Equitable. Petitioners herein include all of the defendants in both cases except the director who resigned and the director who agreed to a consent judgment.

of the corporate petitioners engages in interstate commerce and has capital, surplus, and undivided profits in excess of $1 million (J.A. 25, 60-61).

The parties also stipulated that furnishing credit is part of the trade and commerce of the United States and that business entities competing in the extension of credit in the form of mortgage and real estate loans include both commercial banks and insurance companies (J.A. 28, 64). They further stipulated that the petitioner banks, by virtue of their business and location, have been and are competitors of the petitioner insurance companies "in the extension of mortgage and real estate loans" and that such competition "is not insubstantial" (J.A. 31, 66).[2] As the district court observed, by this stipulation, petitioners "admit * * * that an agreement between them to eliminate competition would be an antitrust violation" (Pet. App. 54a; see J.A. 23, 58).

According to the stipulation, petitioner Crocker National Bank, which has its principal place of business in the State of California (J.A. 26), had outstanding loans totalling approximately $6.3 billion and real estate mortgage loans totalling more than $1.5 billion in 1974. In that same year, the three insurance companies with which it was linked through interlocking directorates—Metropolitan, Equitable, and MONY—had outstanding mort-

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[2] The stipulations state that both the banks and insurance companies originate real estate loans and invest in such loans originated by others (J.A. 28-29, 64-65). The stipulations also identify other areas of competitive overlap in the business activities of the banks and insurance companies. Thus, the parties stipulated that the petitioner insurance companies issue policies providing for "cash values" against which policyholders may borrow and that some policyholders purchase life insurance policies at least in part to serve a savings function in their financial planning. Correspondingly, the parties stipulated that the petitioner banks maintain savings accounts for depositors and offer various forms of loans to depositors and consumers, generally in the form of loans secured by savings deposits, signature loans, and overdraft and other consumer loans secured by real or personal property or the cash value of a life insurance policy (J.A. 29, 65).

gage loans of $12 billion, $6.8 billion, and $1.2 billion, respectively, including $1.6 billion, $785 million, and $197 million in such loans, respectively, on real estate located in California (J.A. 30).[3] Similarly, in 1974, petitioner Bank of America, which also has its principal place of business in California (J.A. 61-62), held more than $30 billion in outstanding loans and $5 billion in real estate mortgage loans and Bankers Trust had total loans of approximately $11.5 billion, including an unspecified amount of real estate mortgage loans. Prudential Insurance Company, with which the Bank of America and Bankers Trust were interlocked, held approximately $12 billion in real estate loans, including $1.6 billion on real estate located in California (J.A. 65-66).[4]

2. In view of the stipulations of the parties on all pertinent issues of fact, the principal issue before the district court was a question of law: whether the conceded interlocks between directors of the petitioner banks and insurance companies are exempt from the prohibition in Section 8 of the Clayton Act against interlocking directorates between competing corporations. Resolution of this question turned on the language of the fourth paragraph of Section 8 that bars interlocks between two or more corporations "other than banks, banking associations, [and] trust companies." The United States contended that the quoted phrase exempts only interlocks between two or more banking institutions, which are separately regulated by the first three paragraphs of Section 8. Petitioners, in contrast, contended that the quoted phrase serves not only to remove interlocks between two or more banks from the coverage of the fourth paragraph of Section 8, but also to exempt entirely from all regulation under Section 8

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[3] In 1974, Crocker Bank had assets totalling $10 billion, and Metropolitan, Equitable, and MONY had assets totalling $32 billion, $17.5 billion, and $4.3 billion, respectively (J.A. 29-30).

[4] In 1974, the Bank of America, Bankers Trust, and Prudential had total assets of $59.3 billion, $19.2 billion, and $35 billion, respectively (J.A. 65-66).

any interlock between a bank and a non-bank entity with which it directly competes, even though such interlocks are not separately regulated.

The district court granted petitioners' motions for summary judgment and dismissed the government's complaints (Pet. App. 51a-85a). It concluded that the phrase "other than banks" in the fourth paragraph of Section 8 exempts from the coverage of that paragraph not only interlocks between banks but also interlocks, such as those at issue here, involving a bank and a non-bank competitor. The district court further concluded that the interlocks between the bank holding companies and the insurance companies are exempt from coverage under the fourth paragraph because of its conclusion that the interlocks between the holding companies' wholly owned subsidiary banks and the insurance companies are so exempt (*id.* at 82a-83a).[5]

3. The court of appeals reversed (Pet. App. 1a-50a). It concluded that, viewing the text of Section 8 as a whole, the exemption for "banks" provided in the fourth paragraph of Section 8 relates back to the first three paragraphs, which separately regulate interlocks between two or more banks. Thus, the court reasoned, the exemption in the fourth paragraph should be construed to be similarly focused; it should not be construed to exclude from Section 8 interlocks between banks and their non-bank competitors, such as insurance companies, which are not subject to regulation under the first three paragraphs. Read in this way, the court observed, the four paragraphs of Section 8 cover all horizontal interlocks between competing corporations and loopholes in statutory protection are avoided (*id.* at 8a-9a).

The court of appeals found that its reading of the statutory language was supported by the purposes of Sec-

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[5] However, the court observed that if the interlocks between the subsidiary banks and insurance companies are illegal, "a strong case could be built" that the interlocks linking the bank holding companies and the insurance companies also would be prohibited (Pet. App. 83a-84a n.25).

tion 8 as described in the legislative history: the promotion of competition through prohibition of interlocking directorates among large competing corporations, and the limitation of concentration of control over capital by the prohibition of personnel interlocks among financial institutions. Interpreting Section 8 to prohibit interlocking directorates among competing banks and insurance companies would further both of these purposes, the court noted, while exempting such interlocks from all restrictions would serve no congressionally articulated purpose (Pet. App. 11a-19a). The court also explained that its interpretation of the phrase "other than banks" in Section 8 was reinforced by the traditional presumption against finding exemptions from the coverage of the antitrust laws.

Finally, the court concluded that the interlocks between the bank holding companies and the insurance companies involved in this case violate the statute. It held that, in determining whether a holding company competes with another corporation, the business of the subsidiary must be attributed to the parent if the parent substantially controls the policies of the subsidiary. In the court's view, a contrary result "would ignore the Supreme Court's admonition that the antitrust laws are 'aimed at substance rather than form' " (Pet. App. 38a, quoting *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227 (1947)). In this case, the extent of control exercised by the holding companies over their subsidiaries was found to be established as a matter of law on the stipulated record (Pet. App. 37a-40a).[6]

Judge Kennedy dissented (Pet. App. 48a-50a). Although he believed that the majority's "meticulous examination of both the statute and its history demonstrates that the question is a difficult one" (Pet. App.

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[6] The court of appeals also held that the interlocks at issue here are not excluded from the coverage of Section 8 of the Clayton Act by virtue of Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b) (Pet. App. 41a-48a). Petitioners have not raised that issue in this Court.

49a), and although he agreed that a reading of the statute that exempts the interlocks at issue here could be viewed as creating a loophole in statutory protection (*ibid.*), Judge Kennedy nevertheless adopted the reasoning of the district court (*id.* at 48a-50a).

SUMMARY OF ARGUMENT

I

A. The text of Section 8 of the Clayton Act does not warrant an interpretation that would exempt an interlock between a bank and an insurance company from the general prohibition against interlocks between competing corporations engaged in commerce. Paragraph four of Section 8 bars interlocks between two or more corporations "other than banks, banking associations, [and] trust companies." The quoted phrase, upon which petitioners rely for their claim of exemption, makes no mention of the insurance companies that they seek to bring within its scope. Moreover, the phrase is written in the plural, referring, as relevant here, to "banks." It does not serve to exempt an interlock involving only a single bank. Elsewhere in paragraph four, where Congress intended the status of only one party to an interlock to be controlling, it expressly so provided by phrasing the pertinent language in the singular; Congress' failure to do likewise in the exempting phrase at issue here confirms that an interlock involving only a single bank is not covered by the exemption.

This reading of the text of paragraph four standing alone is reinforced by the structure of Section 8 as a whole. As originally enacted and as now in effect, the general prohibition in what is now paragraph four follows other paragraphs that specifically regulate interlocks between two or more banking institutions. The exempting phrase in paragraph four serves merely to ensure that interlocks between two or more banking institutions that are separately regulated by those paragraphs would not also be subject to the different standards embodied in paragraph four. This close interrelationship among the

paragraphs of Section 8 strongly indicates that an interlock between a bank and an insurance company—an interlock that is not separately regulated in the initial paragraphs—is not within the scope of the exempting phrase. Moreover, the comprehensive approach to horizontal interlocks embodied in Section 8 militates strongly against recognizing an exemption, not expressed in the statute itself, for the substantially anticompetitive interlocks at issue in this case.

B. The legislative history of Section 8 likewise does not warrant an interpretation that would exempt such interlocks from all restrictions. The version of what is now paragraph four contained in the bills passed by both the House and the Senate was written in terms that are virtually identical to that paragraph as now in effect, except that *neither* contained the phrase upon which petitioners' claim of exemption rests: "other than banks, banking associations, [and] trust companies." The legislative history shows that this phrase was added by the Conference Committee, not to change the substantive meaning of paragraph four, but to make clear that bank interlocks covered by the initial paragraphs of Section 8 would not also be covered by the different standards in paragraph four. Because an interlock between a bank and an insurance company is not covered by the initial paragraphs, the limited purpose of the phrase upon which petitioners rely weighs heavily against a construction that would exempt such an interlock from statutory coverage.

The reports and debates on the legislation also reveal an unambiguous congressional determination that interlocking directorates among large competing companies pose a serious threat to the maintenance of a competitive economy, particularly in credit markets, and a firm intent to eliminate that threat. Recognition of a loophole for the interlocks involved here would conflict with that overriding statutory policy.

C. This Court repeatedly has emphasized that exemptions from the antitrust laws are to be construed nar-

rowly. This principle applies not only to implicit exemptions, but also to explicit exemptions, such as the "other than banks" phrase at issue here. To expand the scope of the quoted phrase beyond interlocks between banks, which are governed by other provisions of Section 8, into a grant of *complete* immunity from the antitrust laws for an interlock between a bank and an insurance company, would conflict with this principle.

Moreover, when Congress has granted an antitrust exemption to entities in a particular industry, this Court consistently has declined to extend that exemption to arrangements between such entities and parties outside of the industry. Here, Congress granted an exemption from paragraph four of Section 8 only for the banking industry. Under this Court's decisions, that exemption should not be extended to interlocks involving insurance companies or other corporations outside of the banking industry. This is especially so in view of the fact that an antitrust exemption ordinarily is granted only where the activity in question would be subject to independent regulatory supervision under another statute. Here, although interlocks between banks are subject to the regulatory supervision of the Federal Reserve Board under the first three paragraphs of Section 8, an interlock between a bank and an insurance company is not subject to such independent regulation.

D. The post-enactment legislative and administrative materials relied upon by petitioners do not support their claim of exemption. The House of Representatives' failure to adopt an amendment to Section 8 when it enacted the Depository Institution Management Interlocks Act of 1978, 12 U.S.C. (Supp. V) 3201 *et seq.*, was due to a procedural objection and reflects no view of the scope of Section 8. Moreover, such congressional inaction in 1978, like Congress' failure to enact certain bills between 1965 and 1975, has no bearing on the intent of Congress when it enacted Section 8 in 1914. The enactment of Section 8A of the Clayton Act in 1933 and its repeal in 1935 likewise do not reflect a congressional intent affirmatively to

authorize horizontal interlocks between banks and their non-bank competitors. Section 8A was intended to restrict the ability of banks to risk depositors' funds through stock speculation, not to promote competition.

The fact that the Department of Justice did not bring an enforcement action against interlocks between banks and insurance companies prior to the instant suit cannot be thought to constitute a clear or contemporaneous expression of the Department's interpretation of Section 8. In the years following enactment of the Clayton Act, the Department did not focus its enforcement efforts on that paragraph, but instead sought voluntary resignations by directors. In addition, the Federal Trade Commission's view of the scope of Section 8, as reflected in a decision rendered in 1977, directly supports the view of the United States in this case.

II

The court of appeals correctly rejected petitioners' contention that even if the interlocks between the petitioner banks and insurance companies are unlawful under the fourth paragraph of Section 8, the interlocks between the insurance companies and the parent bank holding companies nevertheless are lawful because the holding companies are not themselves "competitors" of the insurance companies. The subsidiary banks that concededly are engaged in substantial competition with the insurance companies are wholly owned by the holding companies, which, as petitioners have stipulated, control the subsidiary banks by and through the election of all bank directors. Moreover, the provisions of the Bank Holding Company Act, 12 U.S.C. (& Supp. V) 1841 *et seq.*, manifest a clear congressional determination that such holding companies pervasively control the activities of their subsidiary banks and therefore require special regulation. In these circumstances, to conclude that the holding companies are not competitors of the insurance companies with which their subsidiaries are engaged in substantial competition would be highly artificial and would invite circumvention of the broad prophylactic purposes of Section 8.

ARGUMENT

I. AN INTERLOCKING DIRECTORATE BETWEEN A BANK AND AN INSURANCE COMPANY WITH WHICH IT DIRECTLY COMPETES IS NOT EXEMPT FROM THE PROHIBITION IN THE FOURTH PARAGRAPH OF SECTION 8 OF THE CLAYTON ACT AGAINST INTERLOCKING DIRECTORATES BETWEEN COMPETING CORPORATIONS

Introduction

The Clayton Act was enacted in 1914 to supplement the Sherman Act and to remedy its perceived deficiencies. By making illegal various practices that were beyond the reach of the Sherman Act, Congress sought in the Clayton Act to "arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation." S. Rep. No. 698, 63d Cong., 2d Sess. 1 (1914). See, e.g., *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 318 n.32 (1962); *United States* v. *E.I. Du Pont De Nemours & Co.*, 353 U.S. 586, 597 (1957); *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 355 (1922).

Among the practices proscribed to arrest anticompetitive activity in its incipiency was that of maintaining interlocking directorates among competing corporations. S. Rep. No. 698, *supra*, at 1. In enacting Section 8 of the Clayton Act to prohibit such arrangements, Congress expressly responded to the recommendation of President Wilson, who urged a prohibition against "interlockings of the *personnel* of the directorates of great corporations—banks and railroads, industrial, commercial, and public-service bodies—as in effect result in making * * * those who affect to compete in fact partners and masters of some whole field of business." H.R. Rep. No. 627 (Pt. 1), 63d Cong., 2d Sess. 18 (1914) (emphasis in original).

As Judge Weinfeld observed in explaining the background of Section 8:

> Congress had been aroused by the concentration of control by a few individuals or groups over many gigantic corporations which in the normal course of

> events should have been in active and unrestrained competition. Instead, and because of such control, the healthy competition of the free enterprise system had been stifled or eliminated. Interlocking directorships on rival corporations had been the instrumentality of defeating the purpose of the antitrust laws. They had tended to suppress competition or to foster joint action against third party competitors.

United States v. *Sears, Roebuck & Co.*, 111 F. Supp. 614, 616 (S.D.N.Y. 1953) (footnote omitted). See generally pages 20-33, *infra*.

Section 8 was a sweeping response to this perceived evil, a response designed to "'nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates.'" *SCM Corp.* v. *FTC*, 565 F.2d 807, 811 (2d Cir. 1977), quoting *United States* v. *Sears, Roebuck & Co., supra*, 111 F.Supp. at 616. The fourth paragraph of Section 8 broadly bars such interlocks between any two or more competing corporations engaged in commerce where any one has capital, surplus, and undivided profits aggregating more than $1 million, limited only by the phrase "other than banks, banking associations, trust companies, and common carriers [subject to the Interstate Commerce Act]."

The quoted passage in paragraph four does not reflect a congressional intent to exempt banks and common carriers from prohibitions against interlocking directorates. Quite to the contrary, interlocks between banks are separately regulated by the preceding paragraphs of Section 8 itself, for the specific purpose of eliminating concentration of control over capital. Similarly, interlocks between common carriers are separately regulated by the Interstate Commerce Act. 49 U.S.C. (Supp. IV) 11322; see note 13, *infra*. Read together, these provisions manifest an unequivocal congressional intent to address the problem of horizontal interlocks in a comprehensive manner. In view of the structure of the statute, it is unten-

able to suppose that, although Congress generally barred interlocks between two or more competing corporations and specifically barred interlocks between banks because of the dangers posed by the concentration of control over capital, it nevertheless exempted interlocks between banks and non-banking corporations, such as insurance companies, that together control substantial amounts of capital and directly compete in the extension of credit.

The interlocks involved in this case squarely implicate the congressional concerns that led to the enactment of Section 8. Petitioners concede that the banks and the insurance companies with which they are or have been interlocked are direct and substantial competitors in the extension of real estate loans. As the court of appeals observed, in this case alone, "[t]he substantial nature of the competition potentially affected is indicated by stipulations that at the beginning of 1975, outstanding real estate loans of the three banks totalled $6.5 billion and those of the four insurance companies $32 billion" (Pet. App. 7a).

A holding by this Court that interlocks between banks and insurance companies are beyond the scope of Section 8 would open up a loophole in antitrust protection of enormous economic importance. Data for the year 1980 show that commercial banks held mortgage loans totalling at least $263 billion in that year, while insurance companies held mortgage loans totalling $131 billion. In California alone, commercial banks held $46.5 billion and insurance companies $17.8 billion of mortgage loans.[7] The dominant position of banks and insurance companies in the commercial real estate lending market is demonstrated by the fact that in 1981, banks and in-

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[7] *Financial and Business Statistics*, 68 Fed. Res. Bull. A1, A41 (May 1982); United States Bureau of the Census, *Statistical Abstract of the United States* 512 (1981); American Council of Life Insurance, *1981 Life Insurance Fact Book*, at 81.

surance companies together held approximately 64% of all commercial mortgages in the United States.[8]

Petitioners have offered no plausible explanation why Congress would have intended to exempt such clearly anticompetitive interlocks between banks and insurance companies from the reach of the broad prophylactic prohibition in Section 8 of the Clayton Act. Nor do they make any serious effort to defend the interlocks as a matter of statutory policy. In these circumstances, to read into the phrase "other than banks" in the fourth paragraph of Section 8 an exemption for such interlocks would directly conflict with the established principle that "exemptions from the antitrust laws must be construed narrowly." *Union Labor Life Insurance Co.* v. *Pireno*, No. 81-389 (June 28, 1982), slip op. 5.

A. The Literal Terms Of Section 8 Of The Clayton Act Prohibit Interlocking Directorates Between A Bank And A Non-Bank Competitor

The literal terms of Section 8 do not warrant an interpretation that would exempt interlocks between banks and their non-bank competitors from statutory coverage. The fourth paragraph of Section 8 provides in pertinent part:

> No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers * * *, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors * * *.

Petitioners have conceded, as they must, that the banks and insurance companies involved in this case are corporations engaged in commerce. J.A. 25, 60-61; see

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[8] *Financial and Business Statistics, supra*, at A41. Banks and insurance companies held approximately 18.6% and 9.0% of all mortgages. *Ibid.*

United States v. *Philadelphia National Bank*, 374 U.S. 321, 336 n.12 (1963); *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533 (1944). They also have conceded that the petitioner banks compete with the insurance companies with which they are linked through interlocking directorates, that an agreement to eliminate competition between them would violate the antitrust laws, and that all have in excess of $1,000,000 in capital, surplus, and undivided profits. J.A. 23, 25-26, 58, 61-63.

Because all prerequisites for application of the statutory prohibition are satisfied here, petitioners' argument for avoiding application of the prohibition necessarily rests on the premise that the phrase "other than banks, banking associations, [and] trust companies" in the fourth paragraph of Section 8 serves to exempt an interlock between a bank and a competing insurance company from the prohibition that otherwise would apply. As the court of appeals concluded, however, the most natural reading of the general prohibition contained in the fourth paragraph of Section 8, which extends to "two or more corporations * * * other than banks," is that the prohibition applies unless *all* of the interlocked corporations are "banks."

1. It is necessary to begin with the language employed by Congress in drafting the statute. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976). The phrase upon which petitioners rely is expressly limited to "banks, banking associations, [and] trust companies"; that phrase makes no mention whatsoever of the insurance companies that petitioners seek to bring within its scope. Moreover, even in regard to the entities that *are* mentioned in the exemption, the phrase is written in the plural: as relevant here, it applies only to "banks." Giving the terminology used by Congress its "ordinary" and "common meaning" (*Perrin* v. *United States*, 444 U.S. 37, 42 (1979)), it follows that only interlocks involving two or more "banks"—not, as here, interlocks involving a single

"bank" and a non-bank competitor—are excluded from the reach of the fourth paragraph of Section 8.[9]

It also is apparent that when Congress intended the status of only one corporation involved in an interlock to be controlling under paragraph four, it expressly so provided by phrasing the pertinent language in the singular: thus, a preceding phrase in the same paragraph provides that the interlocks that are prohibited are those between two or more corporations "*any one of which* has capital, surplus, and undivided profits aggregating more than $1,000,000" (emphasis added). If Congress had intended the status of just one corporation to be sufficient to bring an interlock within the exempting phrase, it likewise would have drafted that phrase in the singular—by providing, for example, that the fourth paragraph applies to interlocks between two or more corporations "none of which is a bank." Congress did not draft the statute in this manner, but instead conferred an exemption only on interlocks involving "banks."

2. This interpretation of the literal language of paragraph four is confirmed by viewing that paragraph in the context of Section 8 as a whole. The general prohibition in the fourth paragraph[10] against interlocks between competing corporations follows other paragraphs that, both as originally enacted and as currently in effect, specifically regulate interlocks between two or more banks under standards that are quite different from those applied to competing corporations generally.

As originally enacted, the first paragraph of Section 8 barred interlocks between banks only when one of the

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[9] Thus, the phrase "two or more" in the beginning of the fourth paragraph has a distributive meaning. It modifies not only the first reference to "corporations" but also subsequent references to corporations as well, including the "banks" mentioned in the exempting phrase. Only interlocks involving "two or more" banks therefore are excluded by the exempting phrase; those involving a single bank and an insurance company are not.

[10] The present paragraph four was paragraph three of the original statute. Section 8, 38 Stat. 732-733.

two banks had deposits, capital, surplus, and undivided profits aggregating more than $5,000,000 (38 Stat. 732), a figure substantially higher than the $1,000,000 amount needed to trigger the application of the fourth paragraph. The succeeding paragraph further provided that, without regard to the amount of assets, no bank, banking association or trust company organized under the laws of the United States in a city of more than 200,000 inhabitants could have as a director or other officer or employee any private banker or director or other officer or employee of any other bank, banking association or trust company located in the same place. 38 Stat. 733. Similarly, the first three paragraphs of Section 8, as currently in effect,[11] bar interlocks between a member bank of the Federal Reserve System and any other bank, banking association, savings bank, or trust company, without regard to the amount of assets, subject to a number of specifically enumerated exceptions. 15 U.S.C. 19.

Because the substantive standards in the initial paragraphs of Section 8 applicable to interlocks between banks, banking associations, and trust companies were different from the standards embodied in what is now the fourth paragraph, Congress did not intend interlocks between those banking institutions to be covered by both sets of standards. Thus, the exemption in the fourth paragraph for "banks, banking associations, and trust companies" was fashioned with the preceding paragraphs in mind; its purpose was to ensure that there would be no overlapping or inconsistent treatment of interlocks between such institutions. The legislative history confirms that this was the purpose of the exempting phrase.[12]

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[11] The banking paragraphs of Section 8 now in effect were enacted as part of the Banking Act of 1935, ch. 614, 49 Stat. 718. See note 33, *infra*.

[12] 51 Cong. Rec. 16271-16272 (1914) (remarks of Reps. Webb and Sherley). This legislative history is discussed in detail at pages 29-30, *infra*.

Thus, giving due weight to "the structure of the Act" (*Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205, 211 (1979)), the most natural interpretation of the statutory phrase excluding "banks" from the coverage of the fourth paragraph is that this exclusion, like the preceding paragraphs to which it has reference, applies only to interlocks between two or more banks. To construe the exclusion to embrace interlocks between a single bank and an insurance company—interlocks that are not governed by the first three paragraphs—would ignore the architecture of Section 8 and the close interrelationship among all four of its paragraphs.[13]

3. The structure of Section 8 is significant in another respect as well. The text of the section makes abundantly clear that Congress intended in the fourth para-

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[13] The same statutory pattern appears with respect to "common carriers," which also are listed in the exempting phrase in paragraph four of Section 8. Interlocks between officers or directors of two or more common carriers subject to the Interstate Commerce Act are separately regulated by Section 20a(12) of that Act, 49 U.S.C. 20a(12), as added by the Transportation Act of 1920, ch. 91, Section 439, 41 Stat. 496, now codified at 49 U.S.C. (Supp. IV) 11322. Although the provision governing interlocks among common carriers was not actually enacted until 1920, a similar provision was pending before Congress in 1914 (H.R. 16586, 63d Cong., 2d Sess.), and in fact was passed by the House of Representatives on the same day as the Clayton Act. 51 Cong. Rec. 9881, 9910-9912 (1914). Representative Rayburn explained that, under this amendment to the Interstate Commerce Act passed by the House, "[t]he same doctrine just announced in regard to other corporations in general will apply in equal force with regard to railroads." *Id.* at 9688. See also H.R. Rep. No. 681, 63d Cong., 2d Sess. 3 (1914). Moreover, even prior to enactment of the Clayton Act, Congress had amended Section 5 of the Interstate Commerce Act, 49 U.S.C. 5, to limit horizontal interlocks between railroads and water carriers operating through the Panama Canal or elsewhere. Panama Canal Act, ch. 390, 37 Stat. 560, 49 U.S.C. (Supp. IV) 11343. Thus, Congress' treatment of common carriers further manifests its consistent purpose to exempt anticompetitive interlocks from the general coverage of the fourth paragraph of Section 8 only to the extent that regulation exists under other applicable statutory provisions.

graph to bar interlocking directorates between competing corporations generally, and, in addition, intended in the preceding paragraphs to bar interlocks specifically between banks. This all-inclusive statutory scheme surely does not manifest an intent to exempt certain horizontal interlocks between competing corporations from antitrust scrutiny simply because only one of the interlocked corporations is a bank. To the contrary, in view of the comprehensive scope of the statutory scheme, a construction that exempted interlocks between banks and insurance companies that are in direct competition with each other "would create a loophole in the statute that Congress simply did not intend to create" (*United States* v. *Naftalin*, 441 U.S. 768, 777 (1979)).

B. The Legislative History Of Section 8 Does Not Establish A Congressional Intent To Fashion An Exemption For Interlocks Between Banks And Non-Bank Competitors

The legislative history of Section 8 of the Clayton Act reveals an unambiguous congressional determination that interlocking directorates among large competing corporations pose a serious threat to the maintenance of a competitive economy, and a firm purpose to eliminate that threat.

1. The reports of two congressional investigations that immediately preceded passage of the Clayton Act detailed the extent of the concentration of control by a few individuals and groups over many major corporations that, in the normal course of events, would have engaged in vigorous competition. The report of the Stanley Committee, published in 1912, described relationships in the financial, steel, and transportation industries. *Investigation of United States Steel Corporation*, H.R. Rep. No. 1127, 62d Cong., 2d Sess. (1912). The 1913 report of the Pujo Committee described what was termed the "Money Trust" and documented the extent to which interlocking directorates contributed to the elimination of competition

among sources of credit. *House Comm. Appointed Pursuant to House Resolutions 429 and 504 to Investigate the Concentration of Control of Money and Credit*, H.R. Rep. No. 1593, 62d Cong., 3d Sess. 129-130, 138-142 (1913) [hereinafter cited as *Pujo Committee Report*].[14] Louis Brandeis subsequently published a series of articles on interlocking directorates in Harper's Weekly, based primarily on the Pujo Committee report,[15] in which he recommended legislation to outlaw interlocking directorates among competing firms, as well as certain vertical relationships among firms dealing with each other.[16] The 1908 Democratic Party platform likewise called for a "law preventing a duplication of directors among competing corporations," a call renewed in 1912, and the Republican and Progressive parties joined in the demand for new legislation to curb trusts. See *Trust Legislation: Hearings Before the House Comm. on the Judiciary*, 63d Cong., 2d Sess. 4-6 (1914) [hereinafter cited as *Trust Hearings*]; 51 Cong. Rec. 14213 (1914) (remarks of Sen. Shields).

Consistent with this widely shared sentiment, President Wilson sent a message to Congress on January 20, 1914, in which he recommended legislation

> which will effectually prohibit and prevent such interlockings of the *personnel* of the directorates of great corporations—banks and railroads, industrial,

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[14] The Pujo Committee Report spurred demands that the Federal Reserve Act of 1913 prohibit interlocking directorates among financial institutions, a proposal that was rejected in favor of broader antitrust legislation extending the prohibition to other types of corporations as well. See 50 Cong. Rec. 4858 (1913) (remarks of Rep. Gorman); *id.* at 4935 (remarks of Rep. Glass); 51 Cong. Rec. 9180 (1914) (remarks of Rep. Byrnes).

[15] Brandeis, *Breaking the Money Trust*, Harper's Weekly, Nov. 22, 1913, at 10.

[16] See, *e.g.*, Brandeis, *Serve One Master Only!*, Harper's Weekly, Dec. 13, 1913, at 10.

> commercial, and public-service bodies—as in effect result in making those who borrow and those who lend practically one and the same, those who sell and those who buy but the same persons trading with one another under different names and in different combinations, and those who affect to compete in fact partners and masters of some whole field of business.

H.R. Rep. No. 627, *supra*, at 18 (emphasis in original). Not all aspects of the problem of interlocking directorates identified by the congressional investigations, Louis Brandeis, and President Wilson ultimately were addressed by the Clayton Act. Vertical interlocks, for example, were not reached, except for the provision in Section 10, 15 U.S.C. 20, imposing special restrictions in the case of vertical interlocks between common carriers and those with whom they deal.[17] Congress did, however, respond to the findings of these investigations by attacking broadly the problem of *horizontal* interlocks between competing firms.

2. After the President sent his message to Congress, Representative Clayton drafted four tentative bills, one of which was designed specifically to deal with interlocking directorates. *Trust Hearings*, *supra*, at 1577-1579. The House Judiciary Committee held hearings on the tentative antitrust bills, and Representative Clayton thereafter introduced a single revised bill, which was amended in certain respects and reported by the Committee. H.R. Rep. No. 627, *supra*, at 1-6. Section 9 of the Committee

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[17] Section 10 does not bar vertical interlocks among common carriers; rather, it requires competitive bidding under the supervision of the Interstate Commerce Commission, and imposes criminal sanctions for violations. 15 U.S.C. 20. The presence of this special prohibition is explained by the Stanley Committee Report, H.R. Rep. No. 1127, *supra*, which described at length interlocking relationships between railroads and firms with which they dealt and recommended regulatory controls. Louis Brandeis also recommended such legislation. See Brandeis, *The Endless Chain: Interlocking Directorates*, Harper's Weekly, Dec. 6, 1913, at 13, 13-15.

bill dealt with interlocking directorates. The first paragraph barred vertical interlocks between common carriers and those with whom they dealt, and the second and third paragraphs barred interlocks between banking institutions. The fourth paragraph prohibited interlocking directorates among competing corporations in essentially the same language ultimately prescribed by Congress in what is now the fourth paragraph of Section 8, including the exemption for common carriers, but without the phrase "other than banks, banking associations, [and] trust companies." [18] In the absence of this phrase, of course, petitioners would have no textual argument whatever that interlocks involving a bank and insurance company are exempt from the prohibition in paragraph four against interlocks between competing corporations. Thus, the text of the bill, as passed by the House, lends no support to petitioners' position.

The thrust of the report of the House Judiciary Committee and the floor debates also runs counter to the recognition of an exemption for anticompetitive interlocks between banks and insurance companies. The report quoted from President Wilson's speech and noted specifically that the provision dealing with corporate interlocks was intended to carry out his recommendations. H.R. Rep. No. 627, *supra*, at 18. The importance of this section, the Committee stressed, "can not be overestimated" (*id.* at 19-20):

> The concentration of wealth, money, and property in the United States under the control and in the hands of a few individuals or great corporations has grown to such an enormous extent that unless checked it will ultimately threaten the perpetuity of our institutions. The idea that there are only a few men in any of our great corporations and industries who are capable of handling the affairs of the same is contrary to the spirit of our institutions. From an

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[18] 2 E. Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes* 1175-1176 (1978).

> economic point of view, it is not possible that one individual, however capable, acting as a director in fifty corporations, can render as efficient and valuable service in directing the affairs of the several corporations under his control as can fifty capable men acting as single directors and devoting their entire time to directing the affairs of one of such corporations. The truth is that the only service the same director in a great number of corporations renders is in maintaining uniform policies throughout the entire system for which he acts, which usually results to the advantage of the greater corporations and to the disadvantage of the smaller corporations which he dominates by reason of his prestige as a director and to the detriment of the public.
>
> As the President has well said in his message, the adoption of the provisions of this section will bring new men, new energies, new spirit of initiative, and new blood into the management of our business enterprises. It will open the field of industrial development and origination to scores of men who have been obliged to serve when their abilities entitled them to direct. It will immensely hearten the young men coming on and will greatly enrich the business activities of the whole country.

In addition to this pointed description of the need to prohibit interlocks among competing corporations generally, the report also stressed the need to eliminate interlocks between competitors in the credit market. Thus, the committee explained that the paragraphs relating to interlocks among banks were intended—

> to prevent as far as possible control of great aggregations of money and capital through the medium of common directors between banks and banking associations, the object being to prevent the concentration of money or its distribution through a system of interlocking directorates.

H.R. Rep. No. 627, *supra*, at 19.

During the floor debates in the House of Representatives, the interlocking directorate provisions were de-

scribed as imposing "one of the most important and far-reaching legal restraints in the whole history of corporate reform." 51 Cong. Rec. 9576 (1914) (remarks of Rep. Carr). Louis Brandeis' words were invoked in stating that the " 'practice of interlocking directorates offends laws, human and divine,' " tending to the " 'suppression of competition and to violation of the Sherman law.' " *Id.* at 9186 (remarks of Rep. Helvering).[19] Thus Representative Barkley explained, "it is provided in this measure that such conditions are to be remedied in so far as legislation may make this possible and practicable." *Id.* at 9554.

The House debates also stressed the importance of the provisions barring interlocks involving banks. Representative Floyd, one of the drafters of the Clayton Act, cited the findings of the Pujo Committee and stated that "the object of this legislation is to prevent the concentration of capital under one control" (51 Cong. Rec. 9601 (1914)). He also observed that the prohibition against interlocks between banks in the same community resulted from complaints that potential borrowers were rejected by lenders because of interlocking controls over credit. *Id.* at 9603; see also *Trust Hearings*, *supra*, at 387-388. Representative Byrnes, a member of the Pujo Committee, explained (51 Cong. Rec. 9181 (1914)):

> This system of interlocking directorates in financial institutions which has developed during the last 20 years, entirely indefensible as it is, has done more than all else to make possible the menacing concentration of credit in the hands of a few men. The man who controls the credit of the country can, if he desires to do so, control the country and the people who live in it.

In response to an unsuccessful amendment offered by opponents who, like petitioners (Pet. Br. 16-17 n.14),

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[19] Quoting Brandeis, *The Endless Chain: Interlocking Directorates*, *supra* note 17. See also 51 Cong. Rec. 9606 (1914) (remarks of Rep. Webb); *id.* at 9261 (remarks of Rep. McGillicuddy).

contended that the public would be sufficiently protected by the initiation of enforcement action when an interlock between financial institutions actually led to abuse (51 Cong. Rec. 9604 (1914)), Representative Webb responded that this would be inadequate because the "influence of interlocking directorates are such that you can not place your hand upon * * * the source where the damage to a businessman is done" (*id.* at 9606).

Opponents of prohibitions against bank interlocks also argued that financial institutions, entrusted with the public's savings, have a need freely to select their directors that should not be restricted by legislation. See, *e.g.*, 51 Cong. Rec. 9085 (1914) (remarks of Rep. Madden); *id.* at 9255-9256 (remarks of Rep. Graham). But in the case of banks, as well as other corporations, this view was firmly rejected by Congress. See, e.g., *id.* at 9181 (remarks of Rep. Byrnes).

Thus, both the text of the bill passed by the House and the accompanying reports and debates [20] weigh heavily

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[20] Petitioners' reliance (Br. 28-29) on certain remarks of Louis Brandeis and Samuel Untermyer during the House hearings is misplaced. Petitioners observe (Br. 28), for example, that Mr. Brandeis testified that Section 1 of the tentative bill should not be limited to railroads. *Trust Hearings, supra*, at 681. However, Section 1 of the tentative bill, the predecessor of Section 10 as finally enacted, was addressed to the particular problem of interlocks between common carriers and other companies in a *vertical* relationship. *Id.* at 1577-1578. This case, in contrast, involves *horizontal* interlocks. Petitioners' reliance (Br. 28) on Mr. Brandeis' reference to the predecessor of paragraph four of Section 8 as applying to the linking of "industrial" corporations (*Trust Hearings, supra*, at 681) also is misplaced. Paragraph four by its terms applies to *all* interlocks between competing "corporations" * * * engaged in commerce," limited only by the exempting phrase. Petitioners do not deny that the petitioner insurance companies are covered by this paragraph, even though they are not "industrial" in nature; nor do they deny that banks are corporations engaged in commerce.

Petitioners also refer (Br. 29) to a comment made by Mr. Untermyer expressing grave doubts whether a director in a life insurance company should be a director in a bank, and stating: "You have

against recognition of an exemption from the prohibition in paragraph four of Section 8 for an interlock between a bank and an insurance company with which it competes in the extension of credit.[21]

3. The Senate joined in condemning horizontal interlocks, approving the general prohibition in what is now paragraph four of Section 8 in the same form adopted by the House, with only technical changes not relevant

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failed to cover that feature." *Trust Hearings, supra*, at 823. It is clear in context that Mr. Untermyer was discussing the problem of vertical interlocks that could arise if a director of a bank that engaged in the issuance, underwriting, and distribution of securities used his influence as a director of an insurance company to induce it to purchase the securities. *Ibid.* See also *id.* at 868; *Pujo Committee Report, supra*, at 130, 133-135. The remarks of Mr. Brandeis quoted by petitioners (Br. 28) that referred to insurance companies likewise were part of a discussion directed for the most part to the problems of vertical relations between banks and other financial institutions. See *Trust Hearings, supra*, at 922, 925-926; see also *id.* at 679-680. Moreover, both Mr. Untermyer and Mr. Brandeis were referring to provisions of the tentative bill that specifically dealt with relationships among banking institutions (*id.* at 1578), the predecessors of the first three paragraphs of Section 8, not paragraph four, which is at issue here.

[21] Petitioners cite (Pet. Br. 31) a brief exchange on the House floor in which Representative Cullop stated that the present paragraph four "refers to some other corporation than a bank" and does not relate or refer to the banking business. 51 Cong. Rec. 9604 (1914). As the court of appeals observed (Pet. App. 27a-28a), however, the floor debates at the time concerned the paragraphs of the House bill pertaining to interlocks between banks, not the present paragraph four. In response to another Member's error, Rep. Cullop simply made the point that the concluding sentence of paragraph four did not apply to the subject matter then under discussion—interlocks between banks—because the concluding portion of the first bank paragraph contained a parallel provision. See 2 E. Kintner, *supra*, at 1175-1176. The reference to the scope of what is now paragraph four therefore was incidental and appears to reflect nothing more than an understanding that interlocks within the banking business are not covered by paragraph four, but rather by the preceding paragraphs.

here.[22] Because this paragraph of the Senate bill, like the virtually identical paragraph of the House bill, did not contain the phrase "other than banks, banking associations, [and] trust companies," the text of that paragraph as passed by the Senate likewise furnishes no ground for concluding that an interlock between a bank and an insurance company is exempt from the statutory prohibition.

Moreover, the Senate Judiciary Committee reiterated the House Committee's description of the broad purposes of the prohibition, as quoted above (see pages 23-24, *supra*; S. Rep. No. 698, 63d Cong., 2d Sess. 47 (1914)), and a number of Senators denounced interlocking directorates during the floor debates. See, *e.g.*, 51 Cong. Rec. 14320 (1914) (remarks of Sen. Shields); *ibid.* (remarks of Sen. Reed); *id.* at 14537 (remarks of Sen. Cummins).[23] However, the Senate bill deleted provisions of the House-passed bill that specifically regulated interlocks betwen banks, banking associations, and trust companies, on the ground that such regulation should be accomplished by separate amendments to the federal banking laws, with enforcement authority given to the Comptroller of the Currency and the Federal Reserve Board. S. Rep. No. 698, *supra*, at 48.

4. Thus, what is now the fourth paragraph of Section 8, as it was approved by both the House and Senate prior to conference, broadly prohibited all interlocking directorates between large competing corporations engaged in commerce, except common carriers subject to the Interstate Commerce Act. This provision was placed in final form by the Conference Committee. The Conference Committee added the exempting phrase "other

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[22] See 3 E. Kintner, *supra*, at 2429.

[23] Objections that interlocks are necessary to permit corporations to retain experienced directors did not prevail. 51 Cong. Rec. 14538 (1914) (remarks of Sen. Lippitt); *id.* at 14538-14539 (remarks of Sen. Smith). Compare H.R. Rep. No. 627, *supra*, at 19, quoted at page 24, *supra*.

than banks, banking associations, [and] trust companies" to what is now paragraph four, and approved the provisions of the House bill regulating interlocks among banks, banking associations, and trust companies, with certain modifications not relevant here.

The House debate on the Conference Report makes clear that the quoted phrase in paragraph four was added for the purpose of assuring that interlocks between banks would not be subject to the duplicative and in some respects inconsistent standards in that paragraph as well as the specific prohibitions in the preceding paragraphs against interlocks between banking institutions. Representative Mann raised a point of order to the Conference Report on the ground that the addition of the phrase was in violation of the rule that the Conference Committee may not alter the text of a provision to which both Houses have agreed. 51 Cong. Rec. 16269 (1914). Representative Webb explained that the addition had not changed the general prohibition, but only made clear that the preceding paragraphs would govern interlocks between banks (*id.* at 16271):

> Now the point I made is that this is not material, substantial legislation. The conference did put in "banks and banking associations," in order to make perfectly clear what in my opinion is already clear; because in the preceding paragraph we had passed a section with reference to interlocking directorates of banks, and there we made the limitation $5,000,000. Now it would be idiotic to say that we included also banks and banking associations in the paragraph referring to industrial corporations; and in order to make the paragraph perfectly plain, we inserted "other than banks and banking associations" and common carriers, which had no effect upon the meaning of the section.

Representative Sherley concurred in this description of the phrase's limited purpose. *Id.* at 16272. The Speaker, while agreeing with Representative Mann that the rules

prohibited the conferees from changing provisions not in dispute, overruled the point of order on the ground that they had not violated those rules. The Speaker concluded that the "other than banks * * *" language added by the conferees related solely to the paragraphs providing specific standards to govern interlocks between banks, paragraphs which *were* in dispute between the two Houses. *Id.* at 16273.

The House debate on the Conference Report thus makes clear that the addition to paragraph four of the phrase upon which petitioners' argument rests—"other than banks, banking associations, [and] trust companies" —did not change the substance of the provision as it read prior to the insertion of that phrase. Because, in the absence of that phrase, petitioners would have no textual argument whatever that an interlock between a bank and an insurance company is exempt from the general prohibition in paragraph four, it necessarily follows that their textual argument is not advanced by the conferees' insertion of that phrase. The phrase "other than banks * * *" in paragraph four therefore must be read to accomplish no more than what the structure of Section 8 itself suggests: to ensure that interlocks between "banks" are not subject to overlapping and inconsistent regulation under the initial paragraphs of Section 8 as well as paragraph four. Accordingly, an interlock between a single bank and a non-bank competitor, which is not governed by the initial paragraphs of Section 8, is not within the scope of the statutory exemption.[24]

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[24] Petitioners contend (Br. 33-35) that certain comments during the debate on the Conference Report establish that an interlock involving even a single bank and a non-bank competitor is entirely beyond the reach of Section 8. Read in context, however, those comments are not pertinent here.

The basis of Representative Mann's point of order was his belief that the provision which eventually became the fourth paragraph of Section 8 prohibited interlocking directorates between banks, but that the House conferees, without authorization, had "provided that

It may well be that many Members of Congress assumed when the Clayton Act was enacted in 1914 that, even without the exempting phrase "other than banks

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banks shall no longer be controlled by this prohibition of interlocking directorates where banks are in competition" (51 Cong. Rec. 16270 (1914)). In view of the paragraphs of the House bill specifically regulating interlocks between banks, it seems most unlikely that the present paragraph four would have been interpreted in the manner suggested by Representative Mann to apply to such interlocks as well, even in the absence of the exempting phrase added by the conferees. The statements by Representatives Webb and Sherley, quoted by petitioners (Br. 33, quoting 51 Cong. Rec. 16271-16272 (1914)), to the effect that banks were excluded from paragraph four in any event, therefore must be read in the context of the preceding paragraphs of the House bill regulating interlocks between banks. Indeed, in answering Representative Mann, Representatives Webb and Sherley both repeatedly referred to the initial paragraphs of the pertinent section of the House-passed bill that regulated interbank interlocks. *Id.* at 16271-16272. In short, all of this colloquy rests on the assumption that bank interlocks should be regulated by the specifically applicable provisions of the statute now contained in its first three paragraphs, and does not support the view that bank interlocks with companies outside of the banking industry should escape all regulation.

After Representatives Webb and Sherley expressed their views in opposition to the point of order, Representative Mann referred to interlocks between a bank and the "Sugar Trust company," United States Steel Corporation, or a hat manufacturing company. 51 Cong. Rec. 16272 (1914). However, the Speaker thereafter rejected the point of order, referring to the provisions of the House bill regulating interlocks between banks (*id.* at 16273), and Representatives Webb and Sherley did not address Representative Mann's observations regarding bank/non-bank interlocks. As the court of appeals correctly concluded (Pet. App. 28a-30a), remarks of an opponent of the legislation, made in these circumstances, are entitled to little weight. See, *e.g.*, *NLRB* v. *Fruit Packers*, 377 U.S. 58, 66 (1964); *Ernst & Ernst* v. *Hochfelder*, *supra*, 425 U.S. at 204 n.24. This is especially true given Representative Mann's evident confusion of the separate issues of vertical and horizontal interlocks involving banks. See 51 Cong. Rec. 16272-16273 (1914). As this Court has stated, "the primary function of statutory construction is to effectuate the intent of Congress, and that function cannot properly be discharged by reliance upon a statement of a single Congressman, in the face of the weighty countervailing considerations which are present in this case." *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 553 (1960).

* * *," the fourth paragraph of Section 8 would be inapplicable to an interlock involving either a bank or an insurance company because of a belief that neither type of corporation was "engaged in commerce" within the meaning of the fourth paragraph. *Trust Hearings*, *supra*, at 834, 923-924; 51 Cong. Rec. 9390 (1914) (remarks of Rep. Webb). This Court's decision in *Nathan* v. *Louisiana*, 49 U.S. (8 How.) 73 (1850), had indicated that the business of banking was not a part of commerce (see *Transamerica Corp.* v. *Board of Governors of the Federal Reserve System*, 206 F.2d 163, 165-166 (3d Cir. 1953); cf. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 336 n.12 (1963)), and insurance companies generally were not considered to be engaged in commerce because of the decision in *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168 (1868).

Subsequent decisions of this Court have made clear, however, that both banking and insurance are parts of commerce and therefore are subject to the reach of Congress' power under the Commerce Clause. Specifically, this Court has held that the antitrust laws apply to insurance companies and banks engaged in commerce even though the Members of Congress that passed those laws may not have anticipated such a result. See *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533, 556-559 (1944); *United States* v. *Philadelphia National Bank*, *supra*, 374 U.S. at 336 n.12, citing *Transamerica Corp.* v. *Board of Governors of the Federal Reserve System*, *supra*, 206 F.2d at 166. As we have explained, the legislative history of Section 8 reflects a congressional purpose to legislate comprehensively to prevent the evils created by interlocks between competing corporations generally and those involving banking institutions in particular, so "that such conditions [may] be remedied in so far as legislation may make this possible and practicable." 51 Cong. Rec. 9554 (1914) (remarks of Rep. Barkley). In the absence of any affirmative expression of congressional intent to exclude interlocks between a bank and a competing insurance company, this broad statutory

policy must be given full effect under paragraph four (*United States* v. *South-Eastern Underwriters Association*, *supra*, 322 U.S. at 556-557), subject only to the express exemption for interlocks between "banks, banking associations, [and] trust companies" that are separately regulated in the preceding paragraphs. Because there is no evidence of congressional intent to exempt insurance companies from coverage,[25] the statutory policies underlying paragraph four do not justify the creation of an implied exemption for interlocks between a bank and an insurance company.

This Court frequently has observed that it is necessary to "analyze the policies underlying the statutory provision to determine its proper scope." *Rose* v. *Lundy*, No. 80-846 (Mar. 3, 1982), slip op. 8-9.[26] In this case, a construction of the exempting phrase in paragraph four as limited to interlocks between two or more banks regulated by the preceding paragraphs "more accurately reflects the intention of Congress, is more consistent with the structure of the Act, and more fully serves the purposes of the statute." *FBI* v. *Abramson*, No. 80-1735 (May 24, 1982), slip op. 9 (footnote omitted).

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[25] See *South-Eastern Underwriters Association*, *supra*, 322 U.S. at 556-557 (footnote omitted):

> Appellees argue that the Congress knew, as doubtless some of its members did, that this Court had prior to 1890 said that insurance was not commerce and was subject to state regulation, and that therefore we should read the Act as though it expressly exempted that business. But neither by reports nor by statements of the bill's sponsors or others was any purpose to exempt insurance companies revealed. And we fail to find in the legislative history of the Act an expression of a clear and unequivocal desire of Congress to legislate only within that area previously declared by this Court to be within the federal power.

[26] This Court's citation of authorities and summary of principles of statutory construction in *Rose* v. *Lundy*, *supra*, slip op. 8-9) is especially pertinent here:

> *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975) ("[i]n expounding a statute we must * * * look to the provision of the whole law, and to its object and policy. [citation omitted]");

C. The Well Established Presumption Against Recognizing Immunity From The Federal Antitrust Laws Also Supports The Conclusion That The Interlocks At Issue Here Are Subject To Paragraph Four Of Section 8

The conclusion that an interlock between a bank and an insurance company is not exempt from the prohibition in paragraph four of Section 8 also is strongly supported by "governing statutory presumptions" regarding the interpretation of the antitrust laws. *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 732 (1973). This Court repeatedly has emphasized that the antitrust laws embody a fundamental national policy and that exemptions from those laws therefore "must be construed narrowly." *Union Labor Life Insurance Co.* v. *Pireno, supra*, slip op. 5. As the Court stated in *Pireno, supra*, at 5-6, "[t]his principle applies not only to implicit exemptions, see *Group Life & Health Ins. Co.* v. *Royal Drug Co., supra*, [440 U.S.] at 231, but also to express statutory exemptions, see *United States* v. *McKesson & Robbins*, 351 U.S. 305, 316 (1956)."

There can be little doubt that the interlocking directorates challenged in this case implicate the expressly articulated congressional purposes underlying Section 8—i.e., to eliminate interlocks between large competitors and, in

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United States v. *Bacto-Unidisk*, 394 U.S. 784, 799 (1969) ("where the statute's language seem[s] insufficiently precise, the 'natural way' to draw the line 'is in light of the statutory purpose' [citation omitted]"); *United States* v. *Sisson*, 399 U.S. 267, 297-298 (1970) ("[t]he axiom that courts should endeavor to give statutory language that meaning that nurtures the policies underlying the legislation is one that guides us when circumstances not plainly covered by the terms of the statute are subsumed by the underlying policies to which Congress was committed"); *Unexcelled Chemical Corp.* v. *United States*, 345 U.S. 59, 64 (1953) ("[a]rguments of policy are relevant when for example a statute has an hiatus that must be filled or there are ambiguities in the legislative language that must be resolved").

particular, to eliminate interlocks between competitors in the credit market. Petitioners do not contend otherwise. As described at the outset (see pages 14-15, *supra*), major insurance companies and large banks are often horizontal competitors in credit markets,[27] and the stipulations in this case demonstrate the magnitude of that competition among petitioners (J.A. 28-31, 64-66). Petitioners' claim to an immunity from the statute therefore is not " 'harmonious with its scheme and with the general purposes that Congress manifested' " (*FBI* v. *Abramson*, No. 80-1735, *supra*, slip op. 9; quoting *NLRB* v. *Lion Oil Co.*, 352 U.S. 282, 297 (1957) (Frankfurter, J., concurring and dissenting)).

The phrase on which petitioners base their claim of immunity—"other than banks, banking associations, [and] trust companies"—was added to paragraph four to ensure that interlocks between such entities would not be subject to that general prohibition as well as the separate regulatory scheme set forth in the preceding paragraphs for interlocks wholly within the banking industry. See pages 29-30, *supra*. To expand this exemption beyond the scope necessary to achieve that limited purpose, and to imply a grant of *complete* immunity for all interlocks between a bank and an insurance company or other corporation with which the bank directly competes, would contravene the established principle that express exemptions from the antitrust laws are to be narrowly construed.

Moreover, when Congress has granted a limited exemption from the antitrust laws to entities in a *particular industry*, this Court consistently has declined to extend

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[27] See also Staff of the Antitrust Subcomm. of the House Comm. on the Judiciary, 89th Cong., 1st Sess., *Report on Interlocks in Corporate Management* 190 (Comm. Print 1965) (noting that banks regard insurance companies as "direct competitors"); Dunlap, *Interlocking Directorates Under the Clayton Act: A Realistic Look at the Nature of Banking and Insurance Today*, 3 W. St. L. Rev. 284, 291-292 (1976).

that exemption to arrangements between such entities and parties outside of the industry. See *Union Labor Life Insurance Co.* v. *Pireno*, *supra*, slip op. 8, 9, 12-13; *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205, 231 (1979); *National Broiler Marketing Association* v. *United States*, 436 U.S. 816, 822 (1978); *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 389 U.S. 384 (1967); *United States* v. *Borden Co.*, 308 U.S. 188, 204-205 (1939); cf. *Abbott Laboratories* v. *Portland Retail Druggists Association, Inc.*, 425 U.S. 1, 13-14 (1976). In this case, Congress enacted an exemption only for entities within the banking industry—"banks, banking associations, [and] trust companies." This Court's decisions militate strongly against extending this exemption to interlocks involving insurance companies or other entities outside of the banking industry, which "can hardly be said to lie at the center of [the] legislative concern" in enacting the exemption. *Union Labor Life Insurance Co.* v. *Pireno*, *supra*, slip op. 13. This is especially so in view of the fact that the phrase at issue does not serve to exempt even interlocks within the banking industry from all antitrust scrutiny under Section 8; it simply assures that such interlocks will be subject to the special standards in the first three paragraphs governing interlocks within that industry.

It is significant, moreover, that when antitrust immunity has been recognized for particular conduct, that immunity ordinarily is predicated on the existence of independent regulatory supervision under another statute. See, *e.g.*, *Union Labor Life Insurance Co.* v. *Pireno*, *supra*, slip op. 1-2 n.1, 4 n.4; *National Gerimedical Hospital and Gerontology Center* v. *Blue Cross of Kansas City*, 452 U.S. 378, 389 (1981); *National Broiler Marketing Association* v. *United States*, *supra*, 436 U.S. at 819 n.4; *FMC* v. *Seatrain Lines, Inc.*, *supra*, 411 U.S. at 733-735. Section 8 of the Clayton Act is consistent with this pattern. Interlocks between common carriers are exempt from Section 8 and are instead subject to the special regulatory jurisdiction of the ICC. See 49 U.S.C. (Supp. IV)

11322.[28] Similarly, interlocks within the banking industry governed by the first three paragraphs of Section 8 are subject to the special regulatory jurisdiction of the Board of Governors of the Federal Reserve System. See also note 33, *infra*.[29]

In contrast, the interlocks petitioners seek to exempt from the reach of Section 8—interlocks between banks and insurance companies—are not subject to special regulatory jurisdiction conferred elsewhere. The "other than banks * * *" phraseology in paragraph four therefore should not be construed to create an exclusion from antitrust scrutiny for such interlocks, since no regulatory agency has been empowered to oversee those interlocks to protect the public against the dangers aimed at by Section 8.

In summary, all of the principles governing exemptions or immunities from the antitrust laws reinforce a construction of Section 8, supported by its text and legislative history, that does not exempt from scrutiny an interlock between a bank and an insurance company with which it competes. To construe the expression "other than banks * * *" in Section 8 in a manner that would produce such a result "would create a loophole in the statute that Congress simply did not intend to create" (*United States* v. *Naftalin*, *supra*, 441 U.S. at 777).

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[28] The legislative history of the Clayton Act reflects congressional deference to the ICC, which is empowered to protect the public against abuses resulting from carrier interlocks. See, *e.g.*, H.R. Rep. No. 627, *supra*, at 24, 32-33; 51 Cong. Rec. 9071 (1914) (remarks of Rep. Webb); *id.* at 9272 (remarks of Rep. Carlin).

[29] Indeed, the Senate Committee proposed deletion of the provisions of the House bill regulating interlocks within the banking industry precisely because such regulation should be accomplished through amendments to the federal banking laws, which would empower the Federal Reserve Board and the Comptroller of the Currency to protect the public. S. Rep. No. 698, *supra*, at 48.

D. The Post-Enactment Materials On Which Petitioners Rely Do Not Demonstrate That Congress Intended To Exempt Interlocks Between Banks And Non-Bank Competitors From The General Prohibition Of Section 8

Petitioners rely (Br. 21-25, 39-46) on subsequent administrative and congressional actions to support their contention that Congress intended in 1914 to exempt any interlock involving a bank from the general prohibition of Section 8, and thus to immunize bank/non-bank interlocks from all statutory restraints. Such post-enactment evidence by its nature forms a hazardous basis from which to infer an intent on the part of an earlier Congress. See, *e.g.*, *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117-118 & n.13 (1980); *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758 (1979). Moreover, as the court of appeals concluded (Pet. App. 25a-37a), the post-enactment materials on which petitioners rely do not support their assertion that construing the statute to conform to the general purposes articulated by Congress at the time of enactment would conflict with Congress' intent.

1. Petitioners first contend (Br. 21-25) that Congress' consideration of the Depository Institution Management Interlocks Act of 1978, 12 U.S.C. (Supp. V) 3201 *et seq.*, supports their claim of exemption from Section 8. The 1978 Act bars interlocks between a broad range of depository institutions—including commercial banks, savings and loan associations, credit unions and cooperative banks—where the institutions are located in the same or adjacent areas or have assets exceeding a particular amount. 12 U.S.C. (Supp. V) 3201-3203. Petitioners note (Br. 22-25) that when Congress was considering the 1978 Act, the House did not adopt a proposed amendment that would have explicitly confirmed that the standards of Section 8 of the Clayton Act apply to bank/non-bank interlocks. The legislative history demonstrates, however, that the amendment was rejected on procedural grounds,

not on the merits.[30] In any event, the failure of one House of Congress to enact an amendment to the Clayton Act 60 years after its passage is not probative of an affirmative intent by Congress in 1914 to exempt interlocks between banks and insurance companies from all antitrust scrutiny.

For the same reasons, Congress' unexplained failure to enact into law certain bills cited by petitioners (Br. 43 & n.51) that were introduced in the House of Representative between 1965 and 1975 does not support petitioners' position. *United States* v. *Sheffield Board of Commissioners*, 435 U.S. 110, 135 (1978); *United States* v. *Wise*, 370 U.S. 405, 411 (1962). Moreover, those bills did not focus specifically on the issue involved in this case. As petitioners concede (*ibid.*), the bills would have substantially revised Section 8 in other ways having no relevance to the instant case, and the failure of the House to act upon them may well have been attributable to these features.[31]

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[30] The amendment was first introduced in committee, after the district court's decision in this case holding the interlocks here involved to be exempt from the Clayton Act. H.R. Rep. No. 95-1383, 95th Cong., 2d Sess. 201-202 (1978) (additional views of Rep. St. Germain). The legislative history indicates that the amendment was rejected because an amendment to the Clayton Act would have required consideration by a different committee. For that reason, a provision in the bill repealing the first three paragraphs of Section 8, which are in some respects inconsistent with the requirements of the 1978 Act, also was deleted. See H.R. Rep. No. 95-1383, *supra*, at 241 (minority views). A similar floor amendment was rejected on a point of order because amendments to the Clayton Act were not germane and were within the jurisdiction of the Judiciary Committee, which had not considered the bill. 124 Cong. Rec. 33815-33818 (1978). The rejection of the amendment accordingly suggests no congressional view as to the appropriate scope of Section 8 of the Clayton Act.

[31] Nor do the congressional staff reports cited by petitioners (Br. 42-43), which followed the enactment of the Clayton Act by more than 50 years, offer any persuasive guide to the intent of the Congress that enacted Section 8. Moreover, as the court of appeals ob-

Petitioners also argue (Br. 43-44) that the repeal of Section 8A of the Clayton Act in 1935 reveals a congressional intent to authorize interlocks between banks and competing institutions. As the court of appeals correctly concluded (Pet. App. 32a), however, Section 8A is wholly irrelevant to the issue involved here. That provision, enacted in 1933 as part of the Glass-Steagall Act (ch. 89, Section 33, 48 Stat. 194), prohibited interlocking relationships between banks and firms that made loans secured by stock or bond collateral as part of a series of legislative restrictions on banks' freedom to risk depositors' funds through stock speculation. See *Board of Governors of Federal Reserves System* v. *Investment Co. Institute*, 450 U.S. 46, 61-62 (1981); *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 629-634 (1971). Unlike Section 8, Section 8A had nothing to do with preserving competition in the extension of loans. Accordingly, there is no support whatever for petitioners' contention that Section 8A was repealed in 1935 for the specific purpose of permitting interlocks between banks and their nonbank competitors.[32]

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served upon detailed review of the reports, they "are merely assertions without analysis or support, are ambiguous, or refer to vertical interlocks between banks and not to interlocks between competing corporations" (Pet. App. 30a).

[32] Repeal of Section 8A was one of the "technical amendments" included in Title III of the Banking Act of 1935, ch. 614, 49 Stat. 717-718, which made "no fundamental changes in the existing banking laws." H.R. Rep. No. 742, 74th Cong., 1st Sess. 2 (1935). The district court cited (Pet. App. 60a) only page 24 of the House Report for support of its erroneous conclusion that Congress, by repealing Section 8A, intended affirmatively to authorize interlocks between banks and competing institutions. However, there is nothing on that page even remotely suggesting such a purpose. Indeed, in explaining the other amendments to Section 8 made in the same bill, Senator Glass emphasized that the committee had "no desire in the world to weaken the Clayton Act or to weaken the existing law on the subject of interlocking directors of banks" (79 Cong. Rec. 11932 (1935)).

Contrary to petitioners' suggestion (Br. 44-46), the post-1914 amendments to the paragraphs of Section 8 specifically prohibiting personnel interlocks among banks demonstrate a continuing congressional commitment to the original goal of prohibiting interlocks deemed to have significant anticompetitive potential. These amendments constitute a fine-tuning of the basic statutory prohibition. Although Congress did on several occasions exempt certain interlocks from coverage under these paragraphs where the purpose of Section 8 of fostering competition was not significantly implicated, these amendments demonstrate that, when Congress intends interlocks to be wholly beyond the reach of statutory restraints, it has no difficulty in expressly so providing.[33] Congress has

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[33] In 1916, Congress amended the bank paragraphs to authorize the Federal Reserve Board to permit an interlock between a national bank and one or two other banking institutions if such other institution "is not in substantial competition with such member bank." Act of May 15, 1916, ch. 120, 39 Stat. 121. The legislative history demonstrates that this change was not intended to weaken the broad prohibition in the Clayton Act, but rather to limit its application to banks that actually competed. H.R. Rep. No. 600, 64th Cong., 1st Sess. 1 (1916); 53 Cong. Rec. 5873 (1916) (remarks of Sen. Kern); *id.* at 7436 (remarks of Rep. Glass). The 1928 amendment changed the statutory standard to whether the interlock would be "not incompatible with the public interest." Act of Mar. 9, 1928, ch. 165, 45 Stat. 253. This standard scarcely can be thought to reflect an abandonment of the principle that the public must be protected against the evils occasioned by interlocking directorates. See H.R. Rep. No. 487, 70th Cong., 1st Sess. (1928); 69 Cong. Rec. 4173 (1928) (remarks of Sen. Edge). The amendment did not authorize the Federal Reserve Board to abandon the statutory goal of fostering competition. See, e.g., 69 Cong. Rec. 2335 (1928) (remarks of Rep. McFadden). In 1929, Congress exempted joint-stock land banks and other banking institutions "which do no commercial banking business" (Act of Mar. 2, 1929, ch. 581, 45 Stat. 1536) because the business of such institutions was not thought to put them in competition with other banks. See H.R. Rep. No. 2069, 70th Cong., 2d Sess. 1-2 (1929). The original bank paragraphs, as so modified, were replaced in 1935 with the existing bank paragraphs in Section 8, without any purpose of weakening the provisions. 79 Cong. Rec. 11827, 11932 (remarks of Sen. Glass). These amendments to

not so provided, however, in the case of banks and insurance companies.

In a similar vein, petitioners contend (Br. 16-21), without identifying an underlying rationale, that Congress has taken a "highly selective approach" (Br. 17) to the problem of interlocking directorates and that the exemption they seek for an interlock between competing banks and insurance companies therefore should not be regarded as a loophole. This contention also is without merit. Most of the provisions upon which petitioners rely are special, later-enacted restrictions governing *vertical* interlocks between companies in regulated industries and banking entities.[34] The existence of these additional restrictions plainly does not suggest congressional solicitude for horizontal interlocks, which are generally prohibited by paragraph four of Section 8.

Petitioners' reliance (Br. 18) on Section 10 of the Clayton Act, governing vertical interlocks with common carriers, is misplaced for the same reason. Contrary to petitioners' contention (Br. 18, 20), moreover, the failure of Section 10 to cover horizontal interlocks between carriers does not reflect a congressional view in 1914 that such interlocks should be unregulated. As we have explained (see note 13, *supra*), interlocks between common carriers were expected to be—and subsequently were—separately regulated under the Interstate Commerce Act.[35]

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the bank paragraphs simply built on the explicit exemptions in these paragraphs as originally enacted for interlocks that were not perceived by Congress to have a significant competitive effect.

[34] See Br. 20-21, citing 12 U.S.C. 78; 15 U.S.C. 79q(c); 15 U.S.C. 80a-10(c); 15 U.S.C. 80a-10(b)(2); 16 U.S.C. (& Supp. IV) 825d.

[35] Petitioners also note (Br. 18-19) that the first three paragraphs of Section 8 of the Clayton Act apply only where one of the interlocked banks is a member of the Federal Reserve System and therefore do not apply to state-chartered banks that are not members. However, this fact reflects nothing more than what Congress regarded to be an appropriate jurisdictional prerequisite for reg-

2. Petitioners also argue (Pet. Br. 39-41) that there has been a longstanding and contemporaneous administrative construction of Section 8 as exempting interlocking directorates between banks and non-bank corporations, such as insurance companies. Petitioners cite no official policy statement of the Department of Justice for this proposition; they rely instead on the absence of prior cases challenging such interlocks. Even a clearly expressed statement of administrative opinion is not dispositive regarding the intent of the Congress that enacted the statute (see, *e.g.*, *FTC* v. *Dean Foods Co.*, 384 U.S. 597 (1966); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348 (1963)); nor would such an expression affect the obligation to honor the statute's meaning as revealed by its language, purpose, and history. See *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411 (1979). In addition, the mere unexplained failure to file a suit hardly can be deemed a clear (or contemporaneous) expression of the Department's interpretation of Section 8. This is especially so in view of the fact that the Justice Department did not focus its enforcement efforts on Section 8 in the years following enactment of the Clayton Act, relying instead primarily on a policy of ob-

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ulating interlocks between banks. Moreover, although, as petitioners note (Br. 18), only a minority of banks are members of the Federal Reserve System, large banks generally are members. In 1977, for example, member banks held more than 72% of the Nation's commercial banking deposits. See *Monetary Control and the Membership Problem: Hearings Before the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 2d Sess. 79-80 (1978).

Petitioners also point out (Br. 19) that the initial paragraphs of Section 8 do not apply to interlocks between member banks and certain other financial institutions. As petitioners acknowledge (Br. 21-25), however, these paragraphs have now been effectively supplanted by the comprehensive provisions of the Depository Institution Management Interlocks Act of 1978. See 12 C.F.R. 212.7.

taining voluntary resignations.[36] And, far from disagreeing with the position of the United States in this case, the Federal Trade Commission has explicitly rejected petitioners' arguments in an opinion holding that interlocking directorates between competing banks and nonbanks violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. (& Supp. IV) 45. *In re Perpetual Federal Savings & Loan Association*, 90 F.T.C. 608 (1977), vacated on other grounds, 94 F.T.C. 401 (1979).[37]

Thus, the post-enactment materials upon which petitioners rely in no way undermine the conclusion that an interlock between a bank and an insurance company is subject to the prohibition in the fourth paragraph of Section 8 of the Clayton Act. As we have shown, the text of paragraph four, the structure of Section 8 taken as a whole, the legislative history of the statute, and the well-established presumption against recognizing immunity from the antitrust laws, do not permit an interpretation that would entirely exempt the significantly anticompetitive interlocks involved in this case from all statutory restrictions.

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[36] See *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 634 n.8 (1953); Travers, *Interlocks in Corporate Management and the Antitrust Laws*, 46 Tex. L. Rev. 819, 820 (1968).

[37] Petitioners cite (Br. 39-40) a 1950 report, published in 1951, of the FTC for the proposition that that agency believed in 1950 that bank/nonbank interlocks were exempt from Section 8. Federal Trade Commission, *Report on Interlocking Directorates* 10 (1951) [hereinafter cited as *FTC Report*]. But this report contains no examination of the text, legislative history, and purposes of Section 8 in expressing this view more than 35 years after the Act was passed. Moreover, as the court of appeals observed (Pet. App. 35a n.73), the FTC Report focused on *vertical interlocks*, not on horizontal interlocks such as those at issue here. The testimony of former FTC Chairman Engman cited by petitioners (Pet. Br. 40 n.45) likewise related to vertical interlocks, and is irrelevant to the issues in this case.

II. THE INTERLOCKS BETWEEN THE BANK HOLDING COMPANIES AND INSURANCE COMPANIES INVOLVED IN THIS CASE VIOLATE PARAGRAPH FOUR OF SECTION 8

Petitioners contend (Br. 46-50) that even if the interlocks between the petitioner banks and insurance companies are prohibited by the fourth paragraph of Section 8, the interlocks between the insurance companies and the parent holding companies of the banks nevertheless are lawful because the holding companies are not themselves "competitors" of the insurance companies. The court of appeals correctly rejected this highly artificial effort to divorce the bank holding companies from the activities of their wholly owned subsidiary banks—an effort which, if accepted, would invite circumvention of the statute and defeat its prophylactic purpose (Pet. App. 37a-40a). In the circumstances of this case, there can be little doubt that the petitioner holding companies, through their wholly owned subsidiary banks, are competitors of the insurance companies, and that an agreement between the holding companies and insurance companies to eliminate competition in real estate lending by the subsidiary banks and insurance companies would violate the antitrust laws.

Petitioners cite (Br. 47) several lower court decisions for the proposition that interlocking directorates between parent corporations, whose subsidiaries compete, have not been found illegal. None of these decisions, however, suggests that a parent corporation may *never* be regarded as engaged in competition, through its subsidiary, with another company.[38] By the same token, the court of ap-

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[38] In *Kennecott Copper Corp.* v. *Curtiss-Wright Corp.*, 584 F.2d 1195 (2d Cir. 1978), the court expressly reserved the issue whether Section 8 covers a parent corporation that closely controls and dictates the policies of its subsidiary, noting that it was undisputed there that the parent did not control the subsidiary's activities. 584 F.2d at 1205. The decision in *United States* v. *Cleveland Trust Co.*, 392 F. Supp. 699 (N.D. Ohio 1974), aff'd mem., 513 F.2d 633

peals in this case did not hold that a parent corporation *always* must be considered a competitor of another corporation that competes with its subsidiary (see Pet. App. 38a). Rather, observing that the antitrust laws are "aimed at substance rather than form" (*United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227 (1947)), the court of appeals concluded that the key factor is the "extent of control exercised by the parent over the subsidiary's business" (Pet. App. 38a). See also *Crouse-Hinds Co.* v. *Internorth, Inc.*, 518 F. Supp. 416, 448 n.112 (N.D.N.Y. 1980) ("a central question is to what extent the parent controls its subsidiary").[39]

(6th Cir. 1975), rather than supporting petitioners' proposition, indicates that "[w]here the major policies of the subsidiaries are directed by the parents, it would seem that there is a strong case for holding the directorships unlawful." 392 F. Supp. at 712, quoting Kramer, *Interlocking Directorates and the Clayton Act After 35 Years*, 59 Yale L.J. 1266, 1268 n.11 (1950). In *Paramount Pictures Corp.* v. *Baldwin-Montrose Chemical Co.*, 1966 Trade Cas. (CCH) ¶ 71,678 (S.D.N.Y. 1966), the court simply held that the activities of the subsidiary corporation should not be considered when the parent's business is "completely unrelated" to the business of the subsidiary. Petitioners do not and could not argue that the bank holding companies and their bank subsidiaries are in "completely unrelated" businesses. Finally, *United States* v. *Sears, Roebuck & Co.*, 165 F. Supp. 356 (S.D.N.Y. 1958), concerned only the interpretation of a consent decree and has no relevance here.

[39] Petitioners cite (Br. 48 n.56) the 1950 Report of the Federal Trade Commission on Interlocking Directorates (*FTC Report*, *supra*, at 10, 14-15) for the proposition that Section 8 is inapplicable to "indirect interlocks." That Report concludes that certain relationships which are lawful under Section 8 may threaten competition. *FTC Report*, *supra*, at 15, 35-36. Among these are certain "indirect" relationships, such as interlocks resulting when two competing corporations have interlocking directorates with a third company.

These passages do not support petitioners' position. Interlocks between a parent and a competitor of its wholly-owned subsidiary were not mentioned. Moreover, the present case does not involve an "indirect" interlock between competing corporations through directors of a third corporation. Here, the interlocks between the holding companies and the insurance companies are direct, because

It is possible that the directors of a corporation that owned, for investment purposes, a subsidiary corporation engaged in an unrelated line of business might exercise little or no practical influence over the operations of the subsidiary. But the bank holding companies in this case are hardly removed from the business of their wholly owned bank subsidiaries. Petitioners admit that the bank holding companies control their bank subsidiaries "by and through" election of all of the directors of the bank defendants and that those bank directors control the operations and activities of the banks (J.A. 26, 61-62). Thus, the holding companies have the power to replace any bank director who contravenes the holding company's policies and objectives.

Additionally, petitioners admit that they are bank holding companies within the meaning of the Bank Holding Company Act, 12 U.S.C. (& Supp. IV) 1841 *et seq.* (J.A. 25, 61-62).[40] That statute prohibits such holding companies from engaging in activities unrelated to banking. 12 U.S.C. (& Supp. V) 1843. Thus, by law, the business of a bank holding company must be closely related to the banking business of its subsidiaries.

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they share common directors. The question, then, is whether the holding companies and insurance companies are competitors such that the conceded interlocks between them are illegal under Section 8. As explained in the text, they clearly are.

[40] The history of bank holding companies indicates that they were formed for the express purpose of controlling the affairs of subsidiaries. Bank holding companies originated as attempts to avoid restrictions on branching and interstate operations. See Comment, *Transamerica—The Bankholding Company Problem*, 1 Stan. L. Rev. 658, 662-664 (1949); Note, *The Bank Holding Company Act of 1956*, 9 Stan. L. Rev. 333 (1957); Note, *The Bank Holding Company Act Amendments of 1970*, 39 Geo. Wash. L. Rev. 1200 (1971). The major purposes of the Bank Holding Company Act of 1956 were to prevent concentration in the banking industry resulting from the common control of many competing banks and to insure the separation of banking from other businesses. See S. Rep. No. 1095, 84th Cong., 1st Sess. (1955); H.R. Rep. No. 609, 84th Cong., 1st Sess. (1955).

Moreover, both the statute and Federal Reserve Board regulations indicate that bank holding companies must be considered to exercise control over the affairs of bank subsidiaries. The term "bank holding company" is defined in 12 U.S.C. 1841(a)(1) as "any company which has control over any bank or over any company that is or becomes a bank holding company * * *." Under 12 U.S.C. 1841(a)(2), a company is deemed to have control over a bank if:

> (A) the company directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the bank or company; [or]
>
> (B) the company controls in any manner the election of a majority of the directors or trustees of the bank or company. * * *

The Federal Reserve Board interprets this language to establish a conclusive presumption of control. See 12 C.F.R. 225.2(a); see also 12 C.F.R. 7.7376(d). Congress therefore has prescribed definitions of those holding companies that "control" their subsidiary banks (see *Vickars-Henry Corp.* v. *Board of Governors of the Federal Reserve System*, 629 F.2d 629, 634 (9th Cir. 1980)), and has established the conditions under which a bank holding company should be subject to special regulation because of that comprehensive control.[41] This congressional judgment cannot reasonably be ignored in de-

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[41] The exceptions listed in 12 U.S.C. (& Supp. V) 1841(a)(5) support this point. That provision excludes from coverage those holding companies that do not genuinely control their bank subsidiaries. See, *e.g.*, 12 U.S.C. (& Supp. V) 1841(a)(5)(A)-(D). Petitioners' observation (Br. 50) that courts in other contexts have not pierced the corporate veil between a bank and its holding company is irrelevant. The issue here is not whether one company is the alter ego of the other, but whether the holding company has sufficient control over the bank to raise the anticompetitive concerns to which Section 8 is directed.

termining the scope of a bank holding company's business under Section 8.

The court of appeals correctly concluded, therefore, that the bank holding companies here involved are competitors of the insurance companies within the meaning of the statute, and that interlocking directorates between them violate Section 8.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Section 8 of the Clayton Act, ch. 323, 38 Stat. 732-733, as originally enacted, provided:

> That from and after two years from the date of the approval of this Act no person shall at the same time be a director or other officer or employee of more than one bank, banking association or trust company, organized or operating under the laws of the United States, either of which has deposits, capital, surplus, and undivided profits aggregating more than $5,000,000; and no private banker or person who is a director in any bank or trust company, organized and operating under the laws of a State, having deposits, capital, surplus, and undivided profits aggregating more than $5,000,000, shall be eligible to be a director in any bank or banking association organized or operating under the laws of the United States. The eligibility of a director, officer, or employee under the foregoing provisions shall be determined by the average amount of deposits, capital, surplus, and undivided profits as shown in the official statements of such bank, banking association, or trust company filed as provided by law during the fiscal year next preceding the date set for the annual election of directors, and when a director, officer, or employee has been elected or selected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter under said election or employment.
>
> No bank, banking association or trust company, organized or operating under the laws of the United States, in any city or incorporated town or village of more than two hundred thousand inhabitants, as shown by the last preceding decennial census of the United States, shall have as a director or other officer or employee any private banker or any director or other officer as employee of any other bank, bank-

ing association or trust company located in the same place: *Provided*, That nothing in this section shall apply to mutual savings banks not having a capital stock represented by shares: *Provided further*, That a director or other officer or employee of such bank, banking association, or trust company may be a director or other officer or employee of not more than one other bank or trust company organized under the laws of the United States or any State where the entire capital stock of one is owned by stockholders in the other: *And provided further*, That nothing contained in this section shall forbid a director of class A of a Federal reserve bank, as defined in the Federal Reserve Act, from being an officer or director or both an officer and director in one member bank.

That from and after two years from the date of the approval of this Act no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibiilty of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of

this Act it shall be lawful for him to continue as such for one year thereafter.

When any person elected or chosen as a director or officer or selected as an employee of any bank or other corporation subject to the provisions of this Act is eligible at the time of his election or selection to act for such bank or other corporation in such capacity his eligibility to act in such capacity shall not be affected and he shall not become or be deemed amenable to any of the provisions hereof by reason of any change in the affairs of such bank or other corporation from whatsoever cause, whether specifically excepted by any of the provisions hereof or not, until the expiration of one year from the date of his election or employment.

2. Section 8 of the Clayton Act, as currently in effect and as codified at 15 U.S.C. 19, provides:

§ 19. Interlocking directorates and officers.

No private banker or director, officer, or employee of any member bank of the Federal Reserve System or any branch thereof shall be at the same time a director, officer, or employee of any other bank, banking association, savings bank, or trust company organized under the National Bank Act or organized under the laws of any State or of the District of Columbia, or any branch thereof, except that the Board of Governors of the Federal Reserve System may by regulation permit such service as a director, officer, or employee of not more than one other such institution or branch thereof; but the foregoing prohibition shall not apply in the case of any one or more of the following or any branch thereof:

(1) A bank, banking association, savings bank, or trust company, more than 90 per

centum of the stock of which is owned directly or indirectly by the United States or by any corporation of which the United States directly or indirectly owns more than 90 per centum of the stock.

(2) A bank, banking association, savings bank, or trust company which has been placed formally in liquidation or which is in the hands of a receiver, conservator, or other official exercising similar functions.

(3) A corporation, principally engaged in international or foreign banking or banking in a dependency or insular possession of the United States which has entered into an agreement with the Board of Governors of the Federal Reserve System pursuant to section [601 to 604a of Title 12].

(4) A bank, banking association, savings bank, or trust company, more than 50 per centum of the common stock of which is owned directly or indirectly by persons who own directly or indirectly more than 50 per centum of the common stock of such member bank.

(5) A bank, banking association, savings bank, or trust company not located and having no branch in the same city, town, or village as that in which such member bank or any branch thereof is located, or in any city, town, or village contiguous or adjacent thereto.

(6) A bank, banking association, savings bank, or trust company not engaged in a class or classes of business in which such member bank is engaged.

(7) A mutual savings bank having no capital stock.

Until February 1, 1939, nothing in this section shall prohibit any director, officer, or employee of any member bank of the Federal Reserve System, or any

branch thereof, who is lawfully serving at the same time as a private banker or as a director, officer, or employee of any other bank, banking association, savings bank, or trust company, or any branch thereof, on August 23, 1935, from continuing such service.

The Board of Governors of the Federal Reserve System is authorized and directed to enforce compliance with this section, and to prescribe such rules and regulations as it deems necessary for that purpose.

No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter.

When any person elected or chosen as a director or officer or selected as an employee of any bank or other corporation subject to the provisions of this Act is eligible at the time of his election or selection to act for such bank or other corporation in such capacity his eligibility to act in such capacity shall

not be affected and he shall not become or be deemed amenable to any of the provisions hereof by reason of any change in the affairs of such bank or other corporation from whatsoever cause, whether specifically excepted by any of the provisions hereof or not, until the expiration of one year from the date of his election or employment.

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Petitioner's Reply Brief

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v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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* In accordance with Rule 28.1 of the Rules of the Supreme Court, the parent companies, subsidiaries and affiliates of each petitioner are set forth in Appendix II hereto.

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* Reprinted in full as Appendix I hereto.

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---

PETITIONERS' JOINT REPLY BRIEF

We respond here to the Government's main arguments, which are concerned with the meaning of the words of the statute and how their meaning is affected by the structure of the statute and its history. We will show that the Government's interpretation of the "other than" clause is grammatically incorrect and contrary to its plain meaning, that its "architectural" theory of Section 8 is wrong, and that its legislative history argument incorrectly elevates early policy statements over Congress' actual intent as explained by the conferees at the time the statute was enacted.

The Government's other arguments largely repeat those of the Court of Appeals. We have already responded fully to those arguments. No further reply is needed

except to note that the Government's hypertechnical arguments (Gov't Br. 38-44) do not succeed in denigrating the significance of the post-enactment record of administrative and congressional interpretation, a record of over 60 years in which everyone acted as if the statute meant what we believe it means and no one in a position of authority asserted the contrary (Pet. Br. 39-46).[1]

With respect to the bank holding company interlocks (Gov't Br. 45-49), our main brief (Pet. Br. 49-50) has already dealt with the "presumption of control" argument and the corollary strained efforts to inflate the parties' stipulations of fact into implied control. The parties stipulated only that each bank holding company elects all of the directors of its subsidiary bank and they in turn elect the subsidiary's officers who then control its operations and activities. These facts do not, without more, support the conclusion that the holding company thereby exercises such control of the bank's day-to-day activities as to require attribution of the bank's commercial operations to the parent for purposes of Section 8 of the Clayton Act.

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[1] The Government is unconvincing in its attempt to explain its sixty-year acquiescence in this view as due to a preference for seeking voluntary resignations of directors in lieu of enforcement proceedings. (Gov't. Br. 11.) It does not and cannot claim that any voluntary resignations were sought during this period from directors involved in bank/insurance interlocks. Similarly, the Government's reliance on Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980), (Gov't Br. 38) is misplaced. There the Supreme Court was asked to rule on the scope of a statute which was only eight years old. By contrast, here there is an administrative record of over sixty years, and there is no evidence that the Justice Department held its present view of Section 8's interpretation until quite recently. Sixty years of not applying Section 8 to bank-insurance company interlocks surely qualifies as "a situation in which there has been a longstanding contemporaneous administrative construction upon which those subject to the jurisdiction of the agency would have been likely to rely," *id.* at 120, which this Court said in the *Consumer Product Safety Comm'n* case could appropriately be afforded great deference.

I. THE LITERAL TERMS OF SECTION 8 REQUIRE THAT BOTH OR ALL CORPORATE PARTIES TO A FORBIDDEN INTERLOCK BE "OTHER THAN BANKS."

In our opening brief we explained that the pertinent clause of the fourth paragraph of Section 8, "other than banks . . . and common carriers," modifies the introductory phrase of the paragraph, "two or more corporations." Therefore, the prohibition against service as a director of two or more corporations applies only if the corporations—all of them—are corporations that are "other than banks . . . and common carriers." (Pet. Br. 10-12.) This is the natural reading of the words.

Put another way, Section 8 plainly applies only to "two or more corporations . . . other than" corporations that are "banks, banking associations, trust companies, [or] comon carriers . . . ." If this fully spelled-out form of expression were used, the exclusion of any interlock involving a bank (or a banking association, trust company, or common carrier) would be incontestable. Yet, the expanded form says nothing different from what the actual language does, grammatically and syntactically.

In its brief, the Government seeks to substitute a different meaning for the meaning that the words Congress used in Section 8 naturally convey. The key to the Government's argument—which disputes the conclusion reached by the Court of Appeals[2]—is the claim, relegated to a footnote, that "the phrase 'two or more' . . . has a dis-

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[2] The Government claims that the "literal terms of Section 8 prohibit interlocking directorates between a bank and a non-banking competitor." (Gov't Br. 8.) However, the Court of Appeals majority was able to conclude only that the language of Section 8 was equivocal. While both the District Court and the dissent below found that the literal terms of the statute were unequivocal, their reading was that urged by petitioners.

tributive meaning" and "modifies not only the first reference to 'corporations' but also subsequent references to corporations as well, including the 'banks' " mentioned in the "other than" clause. Therefore, the Government says, only interlocks involving two or more banks are covered by the "other than" clause. (Gov't Br. 17 n.9.)

The Government's argument requires the insertion of the words "two or more" into the "other than" clause—where they do not in fact appear—at least once (before "banks"), perhaps again before "common carriers," and logically before each of the other classes of corporations referred to in the clause. But, if "two or more" modifies all succeeding references to corporations in the fourth paragraph of Section 8, an interlock between a bank and a trust company or a bank and a banking association or a bank and a common carrier would not be excluded from the fourth paragraph by the "other than" clause because they would not be interlocks of "two or more banks," "two or more banking associations," "two or more trust companies," or "two or more common carriers." This would directly contradict the Government's claim that the "other than" clause exempts interlocks of the type regulated elsewhere, such as, for example, those interlocks between banks, banking associations and trust companies that are regulated in the first three or "banking" paragraphs of Section 8. Yet the Government does not explain how "two or more" can be made to modify only selected "subsequent references to corporations."

The Government's argument is also grammatically incorrect. Adjectives ordinarily do not have the property the Government attributes to "two or more." Grammatically, what the "other than" clause does is to remove several classes of corporations from the reach of the fourth paragraph, namely "banks, banking associations, trust companies, and common carriers subject to" the Interstate Commerce Act. Thus, the "other than" clause imposes its

meaning on the introductory "two or more" clause and not the other way around, as the Government says.

If, therefore, one begins "with the language employed by Congress in drafting the statute," as the Government correctly says is "necessary" (Gov't Br. 16), one begins with the understanding that the "two or more corporations" as to which director interlocks are forbidden must be corporations that are "other than banks."

Of course, it would be possible, as the Government urges (Gov't Br. 17), to convey the same thought by using some such phrase as "none of which is a bank." But that is immaterial. For one thing, the Government's proposed alternative "none of which is a bank" could itself be phrased alternatively—"not any of which are banks"—demonstrating the irrelevance of the use of singular or plural and showing that the plural "banks" does not have the significance that the Government ascribes to it. More important, the plural "banks" is the form that goes naturally with "two or more . . . other than"; the singular does not. The true significance of "other than" and thus of the use of the plural "banks" is that, when the House and Senate conference committee on the Clayton bill came to consider the treatment of banks (p. 12, *infra*), the "other than" clause was already in the statute and used the plural in its reference to "common carriers." [3]

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[3] That the plural form of "banks" is irrelevant is confirmed by 1 U.S.C. § 1, which states that, in interpreting statutory language, the plural is interchangeable with the singular: "In determining the meaning of any Act of Congress, unless the context indicates otherwise— . . . words importing the plural include the singular." Moreover, Congress' use of the plural in the "other than" clause is consistent with the language in the "commerce" and "competition" clauses, which, like the "other than banks" clause, are not phrased in the singular. The Government does not contend that only one of the interlocked corporations must satisfy each of these requirements, and it offers no explanation why the "other than banks" requirement should be construed any differently.

II. THE STRUCTURE OF SECTION 8 AND A RELATED PROVISION CONFIRMS THE NATURAL READING OF ITS WORDS.

The Government appeals to what it calls "the architecture of Section 8" (Gov't Br. 19) in attempting to sustain the position of the Court of Appeals that the exclusion of banks from the fourth paragraph is limited to horizontal bank/bank interlocks because those types of interlocks are regulated in the first three paragraphs.

The Government's architectural scheme would be neat and perhaps even plausible *if* Section 8 were differently worded, *if* it stood alone, and *if* its structure had remained the same all of the time it was being considered. None of those conditions in fact obtains. There is an unruly element in the architectural plan the Government suggests that it takes no better account of than did the Court of Appeals (*see* Pet. Br. 13-16), *i.e.*, the common carriers that appear in neighboring Section 10 and share the "other than" clause of the fourth paragraph with the banking institutions at issue in this case.

Common carriers, indeed, began as the only subjects of the "other than" clause. (*See* Gov't Br. 22-23.) Certain vertical interlocks between common carriers and their suppliers were prohibited by the first paragraph of the section of the original Clayton bill that was to become Section 8 of the law. The second and third paragraphs dealt with interlocks between banking institutions. The fourth, industrial corporations, paragraph was in much the form of that paragraph of Section 8 as finally enacted except that the "other than" clause extended *only* to common carriers.

Notwithstanding the fact that the common carriers paragraph regulated only vertical interlocks, the reference to common carriers in the "other than" clause has always been understood as excluding all interlocks—horizontal or vertical—in which one or more of the companies was a common carrier. No one concerned with the legis-

lation at the time it was enacted contended otherwise. No one has contended otherwise since. In speaking to his point of order concerning the fourth paragraph (pp. 11-15, *infra*), Congressman Mann took for granted that "[o]f course this bill does not apply to railroad companies engaged in commerce." 51 Cong. Rec. 16273 (1914) (App. I 18a).[4]

The Government does not deny this point but tries to skirt it by arguing (Gov't Br. 19 n.13) that the reference to common carriers in the "other than" clause is attributable to an entirely different bill, H.R. 16586, which provided for the regulation of inter-carrier interlocks by the Interstate Common Commission.

That explanation simply will not do. The "other than" clause of the Clayton bill predates H.R. 16586, the carrier bill, and the provision of the carrier bill that would have empowered the ICC to regulate horizontal carrier interlocks was prompted by the failure of the Judiciary Committee to regulate such interlocks in the Clayton bill —not vice versa. In reporting the carrier bill, the Committee on Interstate and Foreign Commerce explained:

> Your committee has seen proper to provide and report another provision in the bill prohibiting common or interlocking directorates and management. When we learned that the Judiciary Committee was not undertaking to deal with the directorates of railroad companies, we then heeded what appears to be a public and almost universal demand to prohibit interlocking directorates of carriers.[5]

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[4] Congressman Mann was responding to a colleague's question: "I would like to ask for information what the effect would be in a case of this kind—where a railroad in the State of Pennsylvania is a stockholder, or the directors of the railroad are stockholders, in a trust company, the same directors being directors in a banking institution." 51 Cong. Rec. 16272 (1914) (App. I 18a).

[5] H.R. Rep. No. 681, 63d Cong., 2d Sess. 3 (1914).

Moreover, by the time the Senate passed its version of the Clayton bill in September 1914 (the House having acted on both the Clayton bill and the carrier legislation in June), the provision in the separate carrier bill regulating carrier interlocks had been dropped by the Senate Interstate Commerce Committee. That committee reported a bill without the interlock provision in July. *See* S. Rep. No. 706, 63d Cong., 2d Sess. 6-8 (1914).

In the Senate version of the Clayton bill, the original prohibition of interlocks between carriers and their suppliers and underwriters was converted to a requirement of competitive bidding where such interlocks exist, as in the enacted Section 10.[6] The "other than" clause of the industrial corporations paragraph was not changed, *i.e.*, that paragraph still applied to "two or more corporations . . . other than common carriers," even though the Senate by then was informed that there would be no legislation in 1914 dealing with carrier interlocks other than the Clayton bill.

In 1920, as a part of the momentous postwar reshaping of railroad regulatory legislation that was the Transportation Act of 1920, separate legislation was finally enacted to empower the ICC to pass upon carrier interlocks. (Gov't Br. 19 n.13.) Surely few facts are less relevant to a search for the meaning of the Clayton Act of 1914 than that one. And, although the Government refers to an earlier statute, the Panama Canal Act of 1912, (*id.*), it cannot seriously argue that the "other than . . . common carriers" clause of the fourth para-

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[6] The House-passed Section 8 and the differing version that was reported to and passed by the Senate are displayed graphically at pages 69-70 of the Appendix of Defendants-Appellees-Cross-Appellants in the court below lodged with the Clerk of this Court. Language common to the two versions is in regular Roman type, House language stricken by the Senate is underscored, and language added by the Senate is in italics.

graph of Section 8 reflects the regulation of a limited category of interlocks involving water and rail carriers by that statute. Its brief does not point to a single hint in the legislative history of the Clayton Act that Congress had the Panama Canal Act in mind when it enacted Section 8.

In summary, the "other than" clause in its reference to common carriers cannot sensibly be regarded as in the "same statutory pattern" (*id.*) as the Government tries to weave for banks. Intercarrier interlocks were not regulated elsewhere when the Clayton Act was enacted. The inclusion of "carriers" (plural) in the "other than" clause therefore cannot rationally be thought to be a simple reflection of the regulation of intercarrier interlocks elsewhere. The Government's pattern is non-existent. Since "banks" appear in the same "other than" clause, the exclusion for "banks" cannot be something different from the exclusion for "common carriers." To its credit the Government does not attempt to defend the astonishing conclusion of the Court of Appeals that parallel terms of the same clause might carry different meanings. (Pet. Br. 15.) While thus eschewing the Court of Appeals' crazy-quilt, it does not succeed in fashioning any symmetrical pattern of its own.

The pattern in fact is that the statute separately regulates three different classes of corporations—banks, carriers and industrial corporations—and "the provisions of each paragraph are limited in their application to the corporations belonging to the class named" therein. H.R. Rep. No. 627, 63d Cong., 2d Sess. 18 (1914); S. Rep. No. 698, 63d Cong., 2d Sess. 14 (1914). Thus, returning to the Government's original architectural figure, the structure of the legislation Congress actually enacted demands the inclusion in the industrial corporations paragraph's "other than" clause of all interlocks involving banks or carriers, whatever architectural plan the Government 68 years later wishes that Congress had followed.

III. THE HISTORY OF SECTION 8 DEMONSTRATES THE INTENDED EXCLUSION OF ALL INTERLOCKS INVOLVING BANKS FROM THE INDUSTRIAL CORPORATIONS PARAGRAPH.

The Government says that, in the absence of the reference to banks in the "other than" clause of the industrial corporations paragraph of Section 8, these petitioners would have no textual argument for the exclusion of the interlocks in issue from the paragraph. (Gov't Br. 30.)

The short answer is, of course, that there *is* an "other than banks" clause. For that reason, the Court need not face any question concerning the inferences that it might otherwise be asked to draw from the elaborate treatment of bank interlocks in the first three paragraphs, the commerce and competition requirements of the industrial corporations paragraph, and the contemporary understanding of the limits of interstate commerce. The exclusionary clause is a precise expression of legislative intent and its presence makes it unnecessary to examine what Congress might have intended in the absence of this language.

The fact is that responsible legislators regarded the "other than banks" clause as confirming what was implicit in the scheme of the statute without the clause. The interlock provisions of the Clayton bill were compartmentalized, dealing separately and without overlap with banks, common carriers and industrial corporations. The House and Senate committee reports just quoted (at page 9 above) attest to that scheme. Sponsors of the legislation therefore considered banks to be altogether outside the scope of the industrial corporations paragraph even without the "other than banks" clause.

This understanding appears in the debate on the point of order that was raised by Congressman Mann against the conference committee's addition of banks to the "other

than" clause and elsewhere in the legislative history.[7] In the debate on the point of order, Congressman Sherley said that "any court would hold that the inclusion by name of banks and trust companies in one instance excluded them from the general provisions in the other, and, in addition, banks and trust companies are not such corporations as 'are or shall have been theretofore, by virtue of their business and location of operation, competitors' with industrial corporations." 51 Cong. Rec. 16272 (1914) (App. I 14a).

As the Government recognizes by focusing on it (Gov't Br. 28-30), the debate on Congressman Mann's point of order is the only piece of the history of the Clayton bill in which legislators stated their understanding of the "banks" portion of the "other than" clause. The debate concerned what the statute would have meant in the absence of those words and brightly illuminates the meaning that their addition confirmed or, according to Congressman Mann, established.

The background was this: The Senate had stricken the bank interlock paragraphs from the version of the Clayton bill it passed. (Pet. Br. 31-32.) Significantly, having done so, the Senate amended the provision in the House bill allowing a grace period for compliance with the statute in certain circumstances by deleting the words "bank or other" before "corporation" whenever the words appeared in the final paragraph of what was to be Section 8. (Appendix of Defendants-Appellees-Cross Appellants in the court below, page 79.) It thereby indicated a belief that banks were now wholly outside the coverage of that Section. Representative Sherley later explained that the Senate "had eliminated banks as being subject to the provisions of this act, and therefore it was neces-

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[7] *See*, in addition to the committee reports quoted above, excerpts from the hearings and debates quoted in Petitioners' Brief at 28, 29, 31, and 33-36, in which the sponsors of the bill consistently distinguished separate classes of corporations to be regulated by separate provisions.

sary to strike out, which they did, the words 'bank or other'." 51 Cong. Rec. 16271 (1914) (App. I 13a).

The bill was returned to the House in this form, and the House insisted on a conference. The conferees agreed to reinstate the bank interlock paragraphs (and of course the "bank or other" phrase in the grace-period paragraph). The conferees also added "banks, banking associations [and] trust companies" to common carriers in the "other than" clause of the industrial corporations paragraph, in which the Senate had made only a grammatical correction and no other change. The conferees did not offer any published explanation of their actions. Explanation was left, in the House, to Congressmen Sherley and Webb, members of the conference committee, in responding to a point of order raised by Congressman Mann, who was not a member of the conference committee. His point was simply that, in adding "banks" to the "other than" clause, the conferees had exceeded their authority by amending a provision that was not in controversy between the two houses.

The Webb-Sherley response was that the conferees' addition to the industrial corporations paragraph effected no change and that the addition was made only because the reinsertion of the banking paragraphs had put the scope of the industrial corporations paragraph in issue in the minds of some of the conferees. The Government asserts that the Webb-Sherley response was limited to the proposition that it was only interlocks between two or more banks that were already implicitly excluded from the industrial corporations paragraph by their specific inclusion in their own paragraphs. (Gov't Br. 29-30.) The Government contends that the two conferees understood or professed to understand Congressman Mann as complaining only of the exclusion from the fourth paragraph of such bank/bank interlocks. We submit that the debate cannot fairly be so read. On the contrary, it demonstrates conclusively that Congressman Mann, as

well as the two conferees, viewed the "other than banks" clause as excluding all interlocks involving banks from the prohibitions of the industrial corporations paragraph.[8]

Here we note that Congressman Mann plainly did claim that before it was amended by the conferees the fourth paragraph applied "to a director in a bank and director in a manufacturing institution." *Id.* at 16272 (App. I 15a). He also claimed that it prohibited "a director of a bank with a capital of a million dollars in New York City being also a director in the Sugar Trust Company or any other company." *Id.* He asserted that it "would have prevented Mr. Gray, an officer of the United States Steel Corporation, from being a director in a bank." *Id.* And he insisted that, "without the change made by the conferees, there would be a provision against men acting as directors of a bank and a hat company if there were any sort of competition." *Id.* at 16272-73 (App. I 18a).

The Government's argument is that Messrs. Webb and Sherley did not respond to these examples before the Speaker overruled the point of order. *Id.* at 16273 (App. I 20a). But Congressman Mann's examples of bank/non-bank interlocks did not come out of the blue. They were themselves in direct response to immediately preceding remarks of Congressman Sherley. Congressman Mann prefaced his examples by saying that he did not think that his colleagues Webb and Sherley "quite appreciate what the House did in the bill which it passed . . . ." *Id.* at 16272 (App. I 15a).

What prompted that comment was, among other things, a statement of Congressman Sherley's that the

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[8] For the convenience of the Court, the entire debate, 51 Cong. Rec. 16269-73 (1914), is appended to this brief as Appendix I, pp. 1a-20a.

conferees "inserted in the exclusion proviso that would have been held as excluded in the bill agreed to in conference even if not put there," *i.e.*, banks, banking associations and trust companies, "thus making it plain by the very expression itself that they, along with common carriers, were not within the group outlined as industrial corporations." *Id.* (App. I 14a.) Further, and consistent with a statutory structure regulating three classes of corporations separately, Congressman Sherley said just before Congressman Mann offered his examples that it was "contrary . . . to the plain common sense of the situation" to say that the conference could not "make it clear that only certain banks should be within the provision touching certain interlocking directorates, and that the provision touching industrial corporations was confined to such industrial corporations and should not by any stretch of construction be held to include banks . . . ." *Id.* (App. I 14a-15a.)

To say that "banks were not within the group outlined as industrial corporations" or that the statutory provision "touching industrial corporations should not . . . be held to include banks" is surely to say more than merely that interlocks between two banks are not within the industrial corporations paragraph. The Government's reading of the point-of-order debate is not a permissible reading.

The Government is also wrong in asserting that only the views of Congressman Mann appear from the debate (Gov't Br. 30-31 n.24), and these do not matter because he opposed the "other than banks" clause. The significance of the debate is that the defenders of that clause—those who were responsible for the insertion of "banks"—disagreed with Congressman Mann as to what the statute meant *before* the "other than" clause was amended but demonstrated by the expression of that very disagreement their full agreement with him that *after* the clause

was amended banks were altogether excluded from the industrial corporations paragraph. Thus, both sides understood the plain language of the clause to mean exactly what everyone thought it meant until this litigation was brought.

The remarks of conferees Webb and Sherley must be accorded great weight because, in the absence of a written explanation by the conference committee, they are our only authoritative source of information about what the drafters of the final language of the Clayton bill meant by it.[9] Where, as here, the conference committee changed the language of the statute before its final passage, the "text of the bill as it passed the House" (Gov't Br. 23) is not determinative of congressional intent at the time of enactment; what is pertinent is what the conferees intended when they fashioned the final text before enactment.

Realizing that the legislative history is a fragile basis for imposing new meaning on the words of Section 8, the Government brief retreats into a general and nebulous discussion of Congress' general purposes when the Clayton Act was introduced. (Gov't. Br. 20-28.) The brief thus offers a skewed legislative history which emphasizes the remarks and events most remote in time from enactment, *e.g.*, President Wilson's speeches, and minimizes the conferees' fine-tuning of Section 8.

Even assuming the Government is correct in stating that the general purpose of Congress in *beginning* its consideration of antitrust legislation after 1912 was

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[9] In a case where this Court was called upon to construe the Robinson-Patman Act in the context of its legislative history, the conferees' changes in the Act just prior to enactment were found determinative of Congress' legislative intent. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200 (1974).

broadly to prohibit interlocking directorates which would suppress competition (Gov't Br. 20), the statement scarcely helps in deciding what the legislation finally enacted means. The measure that was enacted as the Clayton Act was controversial and political. It had therefore to be the subject of compromise before it could command a majority of the House and Senate. After these compromises, what was enacted was quite different from what had been proposed. That is how our legislative process works.

So far as the rest of its discussion of legislative history is concerned, the Government emphasizes the broad purpose of Section 8 as described by its sponsors, particularly emphasizing remarks about banks but without always drawing a distinction between banks as lenders and banks as competitors. (Gov't Br. 20-28.) For example, although it quotes a dramatic passage of the presidential message that sounded the keynote of the legislative drive against interlocks in full at one point (*id.* 21-22), at another it elides the quotation (*id.* at 12). The elision masks the fact that, when he spoke of banks, President Wilson was voicing a concern about "making those who borrow and those who lend practically one and the same" and not so much, if at all, a concern about banks as competitors of other non-bank companies.

The significance is that by no stretch can the legislation be made to serve President Wilson's stated goal of keeping borrowers and lenders apart—it does not reach vertical interlocks—and yet his words are solemnly recited by the Government as determinative of the meaning of what Congress did enact. And, while painting with so broad a brush itself, the Government tries to explain away on the most technical, finicky and unsatisfactory grounds the many remarks of sponsors of the legislation and disappointed proponents of more encompassing legis-

lation that reveal how limited was the legislation's coverage of interlocks involving banks. (*Id.* at 26 n.20, 27 n.21.)

CONCLUSION

The Government ultimately falls back on the proposition that exemptions from the antitrust laws are to be narrowly construed. (*Id.* at 34-37.) The doctrine is familiar and vital. This Court scarcely needs to be reminded of it. But it does not carry the day for the Government here. For the issue here is not whether petitioners are immune or exempt from the antitrust laws but whether the interlocks in question satisfy an explicit requirement of this statute. The Government's position would require the Court to ignore the "other than banks" requirement, which is a plain and unmistakable limitation of the coverage of Section 8 that Congress prescribed long ago and that has been relied and acted upon ever since to the knowledge of antitrust enforcers and Congress itself. "[A] statute 'is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes.'" *National Broiler Marketing Ass'n* v. *United States*, 436 U.S. 816, 827 (1978), citing *United States* v. *Sisson*, 399 U.S. 267, 297 (1970) (Harlan, J.).

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APPENDIX I

EXCERPT FROM 51 CONGRESSIONAL RECORD—HOUSE, PAGES 16269-16273, OCTOBER 7, 1914.

[16269] Mr. MANN. Mr. Speaker, I make the point of order against the conference report in that the conferees exceeded their jurisdiction by changing the text of the bill which was agreed to by both Houses and which was not in disagreement and not before the conference committee. The conferees state on page 4 of the conference report:

> Amendment numbered 43: That the House recede from its disagreement to the amendment of the Senate numbered 43, and agree to the same with an amendment as follows: In line 16, page 12, after the word "than," insert the following: "banks, banking associations, trust companies and"; and the Senate agree to the same.

Amendment numbered 43 is an amendment to section 7 of the bill as it passed the House. It is found on page 14 of the House print of the bill with the Senate amendments, which, of course, is not the print referred to in the conference report. Section 7 of the bill is a section in reference to interlocking directorates and provides:

> That from and after two years from the date of the approval of this act no person at the same time shall be a director in two or more corporations, either of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than common carriers subject to the act to regulate commerce, approved February 4, 1887, if such corporations are, or shall have been theretofore, by virtue of their business and location of operation, competitors, so that an elimination of competition by agreement be-

> tween them would constitute a violation of any of the provisions of any of the antitrust laws.

The Senate amendment numbered 43 was a mere grammatical correction. The language referred to two or more corporations, and the House said "either of which had capital." The Senate struck out "either" and inserted "any one," making proper grammar. That was the only matter in dispute in that part of this bill between the two Houses.

The House had passed section 7, prohibiting interlocking directorates of all corporations having a capital of over a million dollars, except those subject to the act to regulate commerce, if it affected competition or if they were competitors, and the Senate agreed to identically the same language, except the mere grammatical correction. What the conferees have done is to eliminate from this section all banking corporations. The language which the conferees have now inserted would make the section read:

> Any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers subject to the act to regulate commerce.

We have heard a great deal in reference to interlocking directorates of banks to stifle competition. Here was a proposition presented to the Congress where the House, by the language which it agreed to, forbade interlocking directorates of banks where competition was affected, and the Senate agreed to identically the same language, and yet the conferees by their report undertake to eliminate from this prohibition of interlocking directorates not only the railroads subject to the act to regulate commerce but also of banks, banking institutions, and trust companies.

On page 243 of the manual, paragraph 539, this language occurs:

> The managers of a conference must confine themselves to the differences committed to them and may not include subjects not within the disagreements, even though germane to a question in issue.

And, again:

> Managers may not change the text to which both Houses have agreed.

The SPEAKER. The Chair would like to ask the gentleman a question in order to get this matter straight.

Mr. MANN. Certainly.

The SPEAKER. The report says in line 16——

Mr. MANN. That is, line 16 of the print of the Senate amendment; but it comes in where I have indicated in the House print of the bill with the Senate amendment. It comes in on line 21, page 14, after the word "than." That is the way the conference report was originally prepared and the way it was originally submitted to the Senate, but as the references were not to the engrossed copy, the conferees properly made the change.

The SPEAKER. The gentleman may proceed. The Chair thought that was it.

Mr. MANN. In 1904 the House passed a legislative appropriation bill containing this language:

> No part of any money appropriated by this act shall be available for paying expenses of horses and carriages, or drivers therefor, for the personal use of any officer provided for herein other than the President of the United States, the heads of executive departments, and the Secretary to the President.

I am reading from volume 5 of Hinds' Precedents, paragraph 6417.

The SPEAKER. The Chair wishes the gentleman would repeat that reference.

Mr. MANN. Volume 5 of Hinds' Precedents, paragraph 6417.

The language in that bill as passed by the House related only to money appropriated by that act, and forbidding the use of money appropriated by that act, being made available for paying the expenses of horses or carriages or drivers therefor for the personal use of any officer except those excepted. The Senate amended the provision by making it read:

> By this or any other act.

And further provided in the same paragraph—

> For the personal use of any officer provided for by this or any other act.

And the question at issue between the two bodies was whether the forbidding of the use of the money appropriated should be confined to the money appropriated by that act or any other act. And it only related to the personal use. The conferees made a report in which they inserted in the text of the bill, after the word "personal," the words "or official," so that the prohibition would extend to the use of money by all officers of the Government except those excepted, for the personal or official use of any officer of the Government.

[16270] I remember the occasion quite well. There was a very bitter fight both in the Senate and in the House, and a great deal of feeling on the subject of carriages being owned by the Government and used by the officials. And the act was passed by the House to only contain, except subject to a point of order, the limitation of money appropriated by that act.

The Senate made it "any other act," and that was the point. But it only applied to personal use, and the conferees inserted "official" in the text, so that it would read for the "personal or official" use of any officer. The point of order was made on the conference report by myself, as I see here. Mr. Cannon was the Speaker.

He had been chairman of the Committee on Appropriations for a great many years, and had an exaggerated idea of reports made by the Committee on Appropriations. I made an argument before Mr. Speaker Cannon, who had said before the argument was made, "There is no use of discussing that. I will overrule the point of order." But I asked to be heard and was heard.

After hearing, the Chair took it under advisement and had the conference report laid over a day, and he secured the valuable asistance [sic] of one of the ablest parliamentarians who has ever lived, in my judgment, Mr. HINDS, and the Speaker came into the House next day and sustained the point of order, and made quite an elaborate ruling on the subject, going over the precedents, and deciding that the conferees, having before them certain amendments which were in disagreement, could not go outside of those amendments and start in to rewrite the text which had been agreed to by both bodies.

Among other things the Chair said:

> This provision in the conference report inserts legislation that never was before the House or before the Senate, and it was quite competent for the conferees, if they could do this, to have stricken out the whole paragraph and inserted anything that was germane.

In other words, if the conferees were empowered to change the text at all, they were empowered to rewrite the bill. That is a function not conferred upon conferees.

Mr. SHERLEY. Will the gentleman tell me the page from which he is reading and the volume?

Mr. MANN. I am reading from page 674, volume 5, of Hinds' Precedents, paragraph 6417.

Now, in paragraph 6420, page 729, in 1907, Mr. James W. Wadsworth, father of the next Senator from

New York State [applause on the Republican side], presented a conference report on the agricultural appropriation bill, whereupon the distinguished gentleman from New York [Mr. FITZGERALD] made a point of order. This was the point of order:

> I wish to make the point of order against the conference report on the ground that the conferees have inserted on page 40 language in an item which was not in dispute between the two Houses. On page 40, line 24, the conferees have changed the text in the language agreed to by both Houses by inserting after the word "forest" the words "in the District of Columbia or elsewhere."

There was a matter where the text had been agreed to by both Houses and the conferees had inserted language in the text to carry out what they may be presumed to have thought was the intent of the two Houses, but intent not expressed in the bill. The Speaker held, sustaining the point of order made by Mr. FITZGERALD:

> The gentleman from New York [Mr. FITZGERALD] makes the point of order that the conferees have exceeded their authority by changing the text to which both Houses have agreed by inserting after the word "forest" the words "in the District of Columbia or elsewhere." And the report states that such is the case. * * * The Chair sustains the point of order.

In the conference report on the railroad bill in 1906—the Hepburn law—there was included in the conference report certain language changing the text of the bill. No point of order was made in the House upon that. It was stated by the conferees that they had done this, and it was subject to a point if anybody desired to make the point of order. In the Senate the same statement was made. Senator TILLMAN was one of the managers of the Senate presenting the report. I refer to Hinds' Precedents, paragraph 6431. He said:

> If Senators will kindly follow me, each Senator can learn what we have done and what we had no rightful power to do. On top of page 12 of the last print, June 2, the words "transportation or facilities" were inserted after the word "traffic" at the end of the preceding line. It is not necessary to state the reason why those words were put in, but it seemed to us that it was necessary to clarify the matter with respect to contracts, agreements, or arrangements which are to be filed with the commission. If the point of order is made against those words in the Senate, or whether or not it is, I think the conferees will take them out. I for one will vote to take them out. We had no right to put them in—

And so forth.

That led to a protracted debate in the Senate, and it was the unanimous opinion, so far as I have gone over it, that the conferees had exceeded their power. But the point of order was dropped. The conferees had stated to both Houses that they had inserted language which would make the conference report subject to a point of order if anybody desired to make it.

The SPEAKER. What became of that point of order in the Senate?

Mr. MANN. It was dropped. No point of order was made.

The SPEAKER. What was it dropped for?

Mr. MANN. The point of order was not pressed. Nobody was objecting to the change that was made, and the conferees had been very frank about it. I remember I was one of the conferees in that case. We were very frank to the House, and stated to the House that it was subject to a point of order.

In 1880, where a question arose as to what the House might do, Speaker Randall held——

The SPEAKER. Where is the gentleman reading from?

Mr. MANN. From paragraph 6436, page 747. I read:

> On June 9, 1880, Mr. Speaker Randall held that the House might not consider a proposed concurrent resolution authorizing conferees on the legislative appropriation bill to take into consideration a subject included in the text to which both Houses had agreed. The Speaker said that under the parliamentary law neither House might change the text to which both Houses had agreed, and, in his opinion, conferees might not be endowed with power greater than either of the Houses possessed.

I shall not detain the Speaker with more of the numerous decisions which have been made upon the subject, except to remind the Speaker of the oleomargarine bill, where the House passed a bill and the Senate added a number of amendments to it. Those amendments of the Senate were considered in the House, and it was proposed, upon the consideration of those amendments, to change the text of the bill as it passed the House, where it had not been amended by the Senate. The point of order was sustained that it was not in the power of the House, after it had passed a bill and sent it to the Senate and the Senate had amended it and it had come back to the House, then to change the text which both Houses had agreed to.

Take this case: Supposing this bill, instead of going to conference, had come before the House for the consideration by the House of the Senate amendments. When we reach section 7 we could dispose of amendment numbered 42, which affected the numbering of the section, and the next question would be upon agreeing or disagreeing to the amendment numbered 43, which inserted the words "any one" in place of the word "either," and the next amendment which would be up for consideration would be amendment numbered 44, which proposes to insert the word "the" in place of the word "an." But it would not have been in order to have offered then

an amendment to the text of the bill which had been agreed to by the House and agreed to by the Senate. When the House passes the bill and a motion to reconsider is disposed of and the bill has gone from the House it is not within the power of the House then to change the text of the bill; not as a matter of right, but of course it may be done by unanimous consent. So that the conferees in this case have gone beyond their jurisdiction, having proposed amendments to the text in a very vital feature of the bill which was not in dispute between the two Houses. They exceeded their jurisdiction and can not make such a conference report.

I know of nothing more vital which was before the House than the power and the right to prevent interlocking directorates of banks. Here was one of the issues that has been more discussed than any other by the great committee of the House which sat for weeks and months —the so-called Untermeyer committee, or the Pujo committee. That was one of the basic things that the committee made findings on, and when this bill was prepared it provided a prohibition against interlocking directorates of banks. The House passed it in that shape. The Senate passed it in that shape. But the House conferees, without authority and over and beyond any jurisdiction granted to them, have provided that banks shall no longer be controlled by this prohibition of interlocking directorates where banks are in competition.

So I say that the conference report should be rejected as subject to a point of order.

Mr. HENRY. Mr. Speaker, I make the point of order that there is no quorum present.

[Roll call]

* * * *

[16271] Had the gentleman from Illinois concluded?

Mr. MANN. I had concluded my argument.

Mr. WEBB. Mr. Speaker, I do not profess to be an expert parliamentarian, but I think I have ordinary com-

mon sense, which may be applied to this situation. I feel that the point of order which my friend from Illinois [Mr. MANN] has made against this conference report is purely and entirely technical, just as much so as if he had made the point that we had put a comma at a certain place in a section whereas we ought to have left out the comma, and when we put it in simply for the purpose of making clear the meaning of that particular section. In order that the Speaker may understand the whole situation, section 9 of the House bill provided against three supposed evils. One was to prevent interlocking directorates between common carriers and supply houses. Another was interlocking directorates of banks, and the third was interlocking directorates of industrial corporations. As to banks the House passed a provision forbidding interlocking directorates of banks that had more than $2,500,000 deposits, capital stock, surplus, and undivided profits. The Senate struck out entirely the paragraph in our section 9 with reference to railroads interlocking in their directorates with supply houses. The Senate struck out entirely our paragraph of section 9 with reference to banks. Then it made a new section entirely, called section 7 as it passed the Senate, and inserted the language which we had in paragraph 3 of section 9, forbidding the interlocking directorates of industrials, making the limit $1,000,000.

Now, Mr. Speaker, my friend from Illinois will admit without question that the third paragraph of section 9 as the bill passed the House was never intended to apply to banks, because we had an express paragraph in section 9 which took care of interlocking directorates in banks.

Now, when the Senate struck out paragraphs 1 and 2, with reference to supply houses, common carriers, and banks, and retained for the most part the reference to interlocking directorates of industrial institutions, but later on struck out all reference to banks, and when we came to rewrite this entire section we restored a

paragraph as a substitute with reference to interlocking directorates of supply houses and railroads. We restored in almost identical language the reference to banks, only increasing the limit from $2,500,000, as it passed the House, to $5,000,000, but in the very next paragraph we provide with reference to industrials that $1,000,000 shall be the limitation, and that it shall not apply to "banks, banking houses," or common carriers. Now, the point I made is that this is not material, substantial legislation. The conference did put in "banks and banking associations," in order to make perfectly clear what in my opinion is already clear; because in the preceding paragraph we had passed a section with reference to interlocking directorates of banks, and there we made the limitation $5,000,000. Now, it would be idiotic to say that we included also banks and banking associations in the paragraph referring to industrial corporations; and in order to make the paragraph perfectly plain, we inserted "other than banks and banks associations" and common carriers, which had no effect upon the meaning of that section. I contend, Mr. Speaker, that common sense ought to govern the action of this house and the ruling of the Speaker, and I know it will; and if you will read the section preceding the one that my friends excepts to, in which we take care of banks and make the limitation $5,000,000, the Speaker can never conclude, even though the words which my friend excepts to are stricken out, that the interlocking directorates provision with reference to industrials was also intended to cover banks, because we have already taken care of banks in a former section or a former paragraph, and we simply put into this section which my friend objects to that which is necessarily implied and expressed in the bill itself. I imagine this House and the Speaker will not while away the time over technicalities which are not new legislation, which are not substantial legislation, and which in no way change the effect or meaning of either one of these sections.

Mr. Speaker, that is all I care to say on the subject.

Mr. SHERLEY. Mr. Speaker, there is not much, if anything, that need be added to the statement of the gentleman from North Carolina [Mr. WEBB]. It needs only a detailed examination of what the House undertook to do in section 9, and what the Senate undertook to do in striking out section 9 and enacting section 7 (Senate print), to come to the conclusion that the conferees had jurisdiction of the matter which they have put into the conference report and which is complained of by the gentleman from Illinois [Mr. MANN].

Section 9 starts out by dealing with directors of railroad companies.

The SPEAKER. That is the original bill.

Mr. SHERLEY. The House bill. The first paragraph of section 9 deals with interlocking directorates of railroad companies and supply companies dealing with such railroads. The second paragraph deals with banks, trust companies, and banking associations, and then the latter part of section 9 deals with industrial corporations. Now, the provision as to interlocking directorates of banks was confined to banks having a capital and surplus of $2,500,000. The provision in regard to industrial corporations was confined to corporations having $1,000,000 of capital and surplus. When the Senate came to consider this it concluded to eliminate from the provisions of the act all reference to banking corporations, and it accordingly struck out that part of section 9 which had related to banking corporations. It carried in as a part of section 7 of the Senate Bill a provision as to industrial corporations. Now, the last part of section 9 related not only to banking corporations, but to banking, industrial, and common-carrier corporations. In other words, the last part of the section contained general provisions relating to all three of the classes.

The Senate concluded to eliminate one of these classes, which was that of the banks, and carried the language

relating to industrials into section 7. In order to emphasize that that was its purpose, when it came to deal with the general provisions of section 9 of the House bill, which it carried into section 7 of the Senate bill, it found it necessary to make another amendment. And so you find the words "bank or other" stricken out where they occur, so that the part of Section 7 which was taken from the latter part of section 9 of the House bill reads:

> When any person elected or chosen as a director or officer or selected as an employee of any corporation subject to the provisions of this act.

They had eliminated banks as being subject to the provisions of this act, and therefore it was necessary to strike out, which they did, the words "bank or other." Now, what confronted the conferees? The House had provided that the provisions touching interlocking directorates should apply to three classes—common carriers, banks, and industrial corporations. The Senate had seen fit to eliminate the banks. That left in issue the material point of whether banking corporations should be brought within the provisions of the law prohibiting interlocking directorates. The House insisted on its provision, and was successful in its insistence, with one or two minor changes. The House had limited the provision as to banks by making it apply to banks with a capital stock of two and a half million dollars.

[16272] The conferees agreed that it should apply to banks with a capital and surplus of $5,000,000. In other words, the House conceded something by making the group smaller and requiring the banks to have a larger capital and surplus, and the Senate conceded something by including banks in it at all. That was a perfectly proper subject for consideration and determination, but evidently in reading the language of the act as it had been originally passed by the House and as it had been incorporated in part by the Senate in section 7, the question was raised as to whether it was not possible that section 7 might be held to apply to banks.

Now, it is perfectly clear to my mind that no court would have so held, because having expressly dealt with banks with a capital stock of two and a half million dollars, when you come to deal with industrial corporations of $1,000,000 any court would hold that the inclusion by name of banks and trust companies in one instance excluded them from the general provisions in the other, and, in addition, banks and trust companies are not such corporations as "are or shall have been theretofore, by virtue of their business and location of operation, competitors" with industrial corporations. The conferees having redrafted the matter, having gotten away from the language of section 9 of the House and section 7 of the Senate in many particulars, concluded that it would leave no matter of argument touching the language of section 7, and therefore the conferees inserted in the exclusion proviso what would have been held as excluded in the bill agreed to in conference even if not put there, to wit, "banks, banking associations, and trust companies," thus making it plain by the very expression itself that they, along with common carriers, were not within the group outlined as industrial corporations.

The rule touching conference reports is perfectly clear, and we are not at issue with the gentleman from Illinois as to that. Manifestly, matter not in issue between the two Houses can not be dealt with in conference, for the very proper rule that it should not be within the power of a few men representing the two Houses to express an opinion upon a matter which has not been considered previously by either House.

But here is a case where the House had considered the question of banks and what banks should be included in the provision touching interlocking directorates. The Senate had considered the matter to the extent of disagreeing entirely with the House and striking out the House provision. There was a direct issue. To say that it was not within the province of the conference to make it clear that only certain banks should be within the provision touching certain interlocking directorates, and

that the provision touching industrial corporations was confined to such industrial corporations and should not by any stretch of construction be held to include banks, is to say what seems to be contrary, as the gentleman from North Carolina says, to the plain common sense of the situation.

Mr. MANN. Mr. Speaker, I do not think the gentleman from North Carolina [Mr. WEBB], or the gentleman from Kentucky [Mr. SHERLEY] quite appreciate what the House did in the bill which it passed, and yet they should know more about it than I do. There were several provisions in section 9 as it passed the House. I have referred to section 7, according to the conference report, which was one of those provisions, one of the last provisions in section 7.

The SPEAKER. The gentleman now is speaking of the original bill.

Mr. MANN. The original bill. It is printed as section 7 in the House print, and that is the one I commented on. That provision applies to all corporations except common carriers subject to the act to regulate interstate commerce and forbidding any person to be a director in two corporations either one of which has a capital of over a million dollars. That applies to a director in a bank and a director in a manufacturing institution. That prohibits a director of a bank with a capital of a million dollars in New York City being also a director in the Sugar Trust company or in any other company. That provision would have prevented Mr. Gary, an officer of the United States Steel Corporation, from being a director in a bank. He has recognized that far enough, supposing it would become a law, according to newspaper reports, by resigning from these other directorates. That provision was not limited as to any corporation with a capital of over a million dollars except as to common carriers, and the common-carrier provision is otherwise provided for by law. It extended to banks, to industrial corporations, to all kinds of corporations. The gentleman from Kentucky [Mr. SHERLEY] and the gentleman from

North Carolina [Mr. WEBB] both said it applied only to industrial corporations. I do not know where they get a warrant for that. It is not in the bill. The language of the bill is:

> That from and after two years from the date of the approval of this act no person at the same time shall be a director in any two or more corporations either of which has capital, surplus, and undivided profits aggregating more than $1,000,000.

With the further provision that it only applies where the corporations are in some sense competitive, in whole or in part. That covers the whole case, but applies only in case of competition. If the two corporations are in no sense competitive, in whole or in part, or engaged in commerce in whole or in part, that does not apply.

Let us see what the banking provision in the same section was. The banking provision was a prohibition that no two banks either one of which had a capital of two and a half million dollars should have the same director, if they were in a city of over 100,000 people. It made no difference whether they were competitive or not; it was not a matter of competition. That provision prohibited a bank in Chicago or in New York City from having as a director a man who was a director of a little outlying bank in the same city. Competition had nothing to do with it. The language of the bill made a specific provision, and it applied only to directors of banks. It only prohibited the director of one bank from being a director of another bank in a city of 100,000 inhabitants. There was no place in the bill except section 7 where there was a prohibition against a director of an industrial corporation being also the director of a bank. It certainly will not be contended by anyone on the floor of this House that after the Money Trust investigation, which cost such a large sum of money and which excited so much attention, an antitrust bill was passed through this House without any prohibition against a bank director also con-

trolling an industrial corporation to which his bank was loaning money or that an industrial corporation with deposits in a bank could have as a director in that bank one of its own directors, who should control the supply of money which was being deposited. The whole theory of the antitrust legislation was to separate the control of money in the banks from the control of industrial corporations, so that all industrial corporations applying to banks should apply on even terms without being controlled by interlocking directorates. That provision was carried in the language of the bill passed by the House and agreed to by the Senate. And now the language which the gentleman says covers the subject only applied to directors as between two banks; it only applied to directors as between two banks when one of them had a capital of two and a half million dollars, and it only applied to banks in cities of over 100,000 inhabitants.

The matter that was in dispute between the two Houses was a Senate amendment which struck out that provision applying to banks in cities of 100,000 inhabitants where one of them had a capital of two and a half million dollars. The matter that was not in dispute between the two Houses was a prohibition, universal throughout the United States, that no bank or other corporation with a capital of a million dollars should have a director in any other corporation, whether it was a bank or an industrial corporation, with which it was in competition.

The gentleman practically admits that the conferees have no right to make the change in the text of the bill. They have the Senate amendment striking out the language of the House in reference to banks in cities of 100,000 inhabitants. That is before the conferees, and they can change it in any germane way. If they choose to insert in that a provision, and it should be germane, which wipes out another section of the bill, that would be within their province; but they have no right to change the text of the bill, and in this case the change of the text is not technical. It goes to the whole merits of this legislation. If there be anything needed in the legislation,

it is to control the conditions between the people who supply the money and the people who use the money, so that all may be upon even terms; and if ever the teeth were drawn out of any provision of law, this unwarranted insertion in the text of the bill draws the teeth not only out of this bill but out of all propositions to control the supply of money.

Mr. DIFENDERFER. Mr. Speaker, will the gentleman yield for a question?

Mr. MANN. Yes.

Mr. DIFENDERFER. I would like to ask for information what the effect would be in a case of this kind—where a railroad in the State of Pennsylvania is a stockholder, or the directors of the railroad are stockholders, in a trust company, the same directors being directors in a banking institution. What would be the effect under such a provision such as we are now considering? Take another case, where a large banking institution has directors who are also directors of a large hat-manufacturing institution. What would be the effect in that case?

Mr. MANN. Mr. Speaker, if the language as perfected by the House and the Senate goes into the law without the change made by the conferees, there would be a provision against men acting as directors of a bank and a hat company if there were [16273] any sort of competition. Of course this bill does not apply to railroad companies engaged in commerce.

The SPEAKER. The Chair will ask the gentleman from Illinois one question. Either in the House bill or the Senate amendment is the question of banks, banking associations, and trust companies mentioned?

Mr. MANN. Oh, certainly they are mentioned.

The SPEAKER. Were they cut out because of anything that was done?

Mr. MANN: I did not hear the Chair.

The SPEAKER. Were banks, banking associations, and trust companies cut out entirely from consideration because of anything that was done?

Mr. MANN. No; they were not cut out from consideration. The Senate adopted an amendment. The House bill carried a provision specifically referring to banks, banking associations, and trust companies in cities of over 100,000 inhabitants, and said that in that case no person should act as director of them if one of them had a capital of two and a half million dollars. The Senate struck that out. That amendment, of course, was in conference, and I think the language is subject to any germane amendment by the conferees.

The SPEAKER. The Chair is ready to rule. In passing on this point of order, of course, the Chair has nothing to do whatever with the wisdom or advisability of this legislation in whole or in part. The only question is, Did the conferees exceed their authority by this language which they put in it as amendment by the conferees to Senate amendment numbered 43? The words added by the conferees are these: "banks, banking associations, trust companies, and." It is well established, and everybody who has paid any attention to it knows it, that the conferees can not go out and drag in new subjects of legislation. Now, if any gentleman is curious to read the decisions on the subject, if he will read two decisions that the present occupant of the chair himself rendered, in which the Chair collated substantially all decisions on the subject, he will have the whole thing within a small compass. These decisions which the Chair rendered are printed in the back of the rule book. The case at bar is this: Originally the House passed a bill with this paragraph in it. This is one of the paragraphs of section 9:

> That from and after two years from the date of approval of this act no person shall at the same time be a director or other officer or employee of more than one bank, banking association, or trust company organized or operating under the laws of the United States either of which has deposits, capital, surplus, and undivided profits aggregating more than $2,500,000.

The Senate struck it all out. The House never agreed to the Senate amendment striking out the House language. Therefore, in the judgment of the Chair, without elaborating this opinion and simply referring to the others, that subject was lawfully before the conferees. If any gentleman does not like the conference report, he has his remedy—to vote against it. The Chair thinks the conferees did not exceed their authority, and the point of order is overruled.

* * * *

APPENDIX II

LIST OF PARTIES AND THEIR CORPORATE AFFILIATES

In accordance with Rule 28.1 of the Rules of the Supreme Court, there is set forth below, with respect to each party, a list of its subsidiaries and affiliates, with the exception of those subsidiaries in which all of the shares (or, in some instances, all shares except directors' qualifying shares) are owned by the parent company and those companies in which the party's holdings are less than forty percent of the outstanding shares. The parent of each bank defendant is its bank holding company, which is also a defendant herein. Midland Bank plc, through a wholly-owned subsidiary, owns more than 50% of the stock of Crocker National Corporation. The remaining corporate defendants have no parent companies.

BANKAMERICA CORPORATION AND BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION

Decimus Computer Leasing Corporation
Decimus Corporation
BA Lepanto Building Corporation
Banca D'America e D'Italia
Finabai-Societe Financiere S.A.
Banco Colombo Americano
Banco International S.A.
BA Finance Corporation (Philippines)
BA (Australia) Limited
BankAmerica Representacao e Servicos Limitada
Corporacion Financiera Asociada S.A.
Financial Group of Kuwait
Jamaican American Merchant Bankers Ltd.
Ouvidor Industria e Comercio Limitada
MISR America International Bank S.A.E.
Savannah Bank of Nigeria Ltd.
First Indo Leasing Co.

Arrendadora Comermex S.A.
Commercial Bank of Africa
BankAmerica Finance Ltd.
BAI Leasing S.p.A.
Tokyo Investment Securities
(International, Inc.)

BANKERS TRUST NEW YORK CORPORATION AND BANKERS TRUST COMPANY

BT Capital Corporation
UBAF Arab American Bank
S.W.I.F.T.
Minbanc Capital Corp.
Graham House Ltd.
Amadac Industries, Inc.
Delta Services Industries, Inc.
Welbac Cable TV Corporation
Aarque Office Systems, Inc.
Robin's Wheel, Inc.
Lesfay Corp.
Reeves Brothers
Petroquimica del Atlantico S.A.
Private Export Funding Corporation
United Bank for Africa, Ltd.
Banque de Tunisie
Banque de Benelux S.A.
Thai Investment & Securities Co. Ltd.
Anscor Capital and Investment Corp.
Dole Philippines Inc.
Tun Thamrong Company, Ltd.
B.T.L. Do Brazil, Ltda.
Bankers Trust G.m.b.H.
Export Credit Insurance Corp. of Singapore

CROCKER NATIONAL BANK AND CROCKER NATIONAL CORPORATION

Adela Investment Corporation S.A.
Crocker Servicos Limitada
Private Export Funding Corporation

Banque de Paris et des Pays Bas (Zaire)
Asia European American Development Corporation
P.T. Mutual International Finance Corporation

The following companies are affiliates of Crocker National Bank and Crocker National Corporation as subsidiaries of Midland Bank plc which, through a wholly-owned subsidiary, owns more than 50% of the stock of Crocker National Corporation:

Administration Services SA
Albiag Beteilingungs AG
Amvai Holdings SA
Anfin BV
AVGS Rentals Ltd.
Avis Car Leasing Ltd.
BCT Midland Bank SA
British Overseas Engineering and Credit Company
Bullion Merchants of South Africa Ltd.
Burkhardt und Co. Grundstucks KG
Caergwrle Investments (Properties) Ltd.
Club 24 Ltd.
Cobana Holding SA
Comfina AG
Compagnie Francaise de Developpement du Commerce Exterieur SA
Condiama Ltd.
Contransport AG
Cossale Properties Ltd.
Cowle Financial Services Ltd.
CR Bailey (Belfast) Ltd.
CREDEX Aussenhandels GmbH
CREDEX (Bermuda) Ltd.
CREDEX Export—Creditbank GmbH
CREDEX (Lausanne) SA
CREDEX (UK) Finance Ltd.
CSO Valuations Proprietary Ltd.
Detisa Holding SA
Drake America Corporation

Drake (UK) International Ltd.
Draymont Securities Ltd.
Ermonti Corporation
Establishment Murban
Establissement Valentine
Euro Dollar Credits Ltd.
Export Credit Corporation
Featherlite Plastics Ltd.
Fermat Investment Corporation Ltd.
Fiat Finance Ltd.
Financement de la Promotion Immobilliere SA (FIPROMI)
Forward Oversea Credit Ltd.
GBF Gesellschaft fur Beteiligungen und Finanzvermittlung mbH
Gesellschaft fur Industrielle Beteiligungen und Finanzierungen mbH
Gesico International SA
Glastry Brick Company Ltd.
Grandstand Tribunes Inc.
Grandstand Tribunes Hire Ltd.
Grandstand Tribunes Manufacturing Ltd.
Grandstand Tribunes Ltd.
Groupement du Checque de Voyage Francais—Francheque
Grundstuckgesellschaft Linenallee mbH
Grundstuckgesellschaft Trinkausstrasse Komanditgesellschaft
Grundstuckgesellschaft Trinkausstrasse mbH
Guyerzeller Zurmont Bank AG
Guymont Services SA
Hong Kong and Shanghai Thomas Cook Ltd.
Hubertus Investment Ltd, Inc.
International Renting and Investment Corporation
Isevana Holding SA
JG Mooney and Company Ltd.
JH Vogeler GmbH and Co KG
Joseph Parks and Sons Ltd.

LACIM SA
LAFCO Netherlands BV
LAFCO (Western Hemisphere) Ltd.
LAMCO Netherlands BV
Leverton (FT) Finance Ltd.
London American Export Finance Ltd.
London American Finance Corporation Limited
London American International Corporation Limited
London American Marketing Corporation Ltd.
Lurbo Ltd.
Lurgan Boxmaking Company Ltd.
Machinery and Engineering Corporation SAH
MAIBL Leasing Ltd.
MAIBL Nominees Ltd.
Mansell Bonded Fabrics Ltd.
Markt Holdings Antiles NV
Markt Holdings Europe BV
Markt (UK) Ltd.
Merpret Holding SA 81. Meritor Investments Ltd.
Meritor Investments Ltd.
MH Shipping Company
Midland and International Banks PLC
Midland-ICL Leasing Ltd.
Midland Montagu Administracao E Participacoe Ltda
Midland Montagu Medical Leasing Ltd.
MLH Consulting Group Ltd.
Montebello AG
Morland Shipping Company
Mount Trading Ltd.
Mythen Holding AG
Naim Trust Ltd.
Nixdorf Computer Rentals Ltd.
Northern Ireland Vehicle Leasing Ltd.
Nova Weigh Ltd.
OUB/Montagu Investment Management Ltd.
Partnership Trust SA
Revas Revisions and Verwaltungsgesellschaft AG
Richmond Finance Ltd.

Rotar Betellungs und Finanzierungs AG
Rydewell Suspensions Ltd.
Samuel Montagu (Hong Kong) Ltd.
Scalesdrene Ltd.
Semesta SA
Servco Europe Ltd.
Sima Holdings SA
Sociedade Ultramarina Ltda (Sulta)
Societe de Placements Mobiliers et Immobiliers SA
Societe Francaise d' Acquisition et de Realisations Immobilieres SEC (SOFARI)
Societe Immobiliere Jean-Pierre SA
Societe Immobiliere Rue Charles Galland 12
Sovalet AG
TB (Holdings) Ltd.
Tempus Management Company AG
TGS Vermogensverwalterungsgesellschaft mbH
Thomas Cook al Rajhl (Private) Ltd.
Thomas Cook at Rostamani (Private) Ltd.
Thomas Cook Kuwait Travel and Tourism Company WLL
Thomas Cook (Philippines) Inc.
Thomas Cook SDN BHD
Thomas Cook Travco WLL
Tisadep Ag
Todi-Immobilien Ag
Tokyo Joint Venture
TP (Holdings) Ltd.
Trinkaus und Burkhardt KG
Trinkaus and Burkhardt Immobilien GmbH
Trinkaus und Burkhardt (International) SA
Trinkhaus und Burkhardt (Schweiz) AG
Tririding Finance Ltd.
Tubular Barriers Ltd.
Tyrone Brick (Holdings) Ltd.
Tyrone Brick Ltd.
Tyrone Poroton Holdings Ltd.
Vadep Holding Ag

Verwaltungsgesellschaft fur Vermogen und Beteiligungen mbH
Viobureu Ag
Wales and Western Properties Ltd.
Wefinvest Ag
Williams Travel Ltd.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

Equico Lessors, Inc.

METROPOLITAN LIFE INSURANCE COMPANY

Transatlantic Reinsurance Company
National Electronic Information
E.T. Barwick Industries, Inc.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

None

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

Bache Halsey Stuart Shields, Inc.
Bache Halsey Stuart (London) Ltd.
Bache Halsey Stuart Shields (France) S.A.
Bache Halsey Stuart Commodities S.A.
Bache Halsey Stuart (Hong Kong) Ltd.
Bache Halsey Stuart (U.K.)
Sony Prudential Life Insurance Company
Essex St. Syndicate, Inc.
John St. Syndicate, Inc.

Amicus Brief

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No. 81-1487

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BANKAMERICA CORPORATION, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION, THE CALIFORNIA BANKERS CLEARING HOUSE ASSOCIATION AND THE AMERICAN BANKERS ASSOCIATION, *AMICI CURIAE* IN SUPPORT OF REVERSAL

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August 16, 1982

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IN THE

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October Term, 1981

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Respondent.

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BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION, THE CALIFORNIA BANKERS CLEARING HOUSE ASSOCIATION AND THE AMERICAN BANKERS ASSOCIATION, *AMICI CURIAE*

This brief is filed in support of petitioners, pursuant to Rule 36.2 and with the consent of all parties.

Interest of *Amici Curiae*

The New York Clearing House Association is an association of twelve major commercial banks in the City of New York which clears checks and other commercial items in the New York area. The California Bankers Clearing House Association is a similar association of eight major commercial banks in the State of California. Both associations

regularly participate as *amici curiae* before appellate courts in cases raising significant legal questions relating to banking.

The American Bankers Association ("ABA") is the largest national trade association of the commercial banking industry, numbering among its members 13,000 banks (about 93% of domestic commercial banks) located in all fifty States and the District of Columbia. The ABA actively participates in litigation raising issues of concern to the commercial banking industry, both through actions instituted in its own name and as an *amicus curiae* in other cases.

All members of each of the *amici* have a strong interest in the ability of experienced directors of nonbanking corporations to serve as directors of commercial banks, subject only to limitations imposed by Congress. The decision below would sharply curtail the service of such directors on gossamer notions of "policy" never enacted into law and, indeed, rejected by Congress whenever proposed.

Statement

Since the inception of the corporate form of business organization, banks and nonbanking corporations have had common directors. This natural practice has provided important experience and perspective to the thousands of enterprises that serve society's material needs and in turn provided banks themselves with continuing knowledge of the banking needs of the communities they serve. The corporations having common directors with banks have always included other financial enterprises, such as insurance companies, and that remains the case today.

Congress was well aware of this established practice in 1914, when it enacted § 8 of the Clayton Act, 38 Stat. 732, as amended, 15 U.S.C. § 19 (1976), which regulates interlocking directorates. Congress dealt in the section's first

two paragraphs (now combined, as amended, into the first paragraph) with interlocks involving banks; Congress dealt in what was then the third and is now the fourth paragraph —known as the "industrial corporations" provision—with interlocks not involving banks, but "two or more corporations . . . other than banks, banking associations, trust companies and common carriers." No provision was included covering interlocks between banks and other corporations of any kind, and no such provision exists today. The quoted language of the "industrial corporations" provision has never been altered.

For sixty years, Congress, the Bar, the business community, and the antitrust enforcement authorities accepted that § 8 meant what it said and had no application to interlocking directorships between banks and other corporations (App. 58a-61a).[1]

In an extraordinary assault upon this abiding consensus, the Antitrust Division brought these test cases in 1975, charging that interlocking directorships between various of the petitioner banks and bank holding companies and various of the petitioner insurance companies violated the fourth paragraph of § 8. The parties stipulated that each of the challenged bank–insurance company interlocks was between "competitors" within the meaning of the fourth paragraph of § 8, and each side moved for summary judgment, posing directly for decision the legal question of whether that provision applied to banks (App. 51a-54a).[2]

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[1] "App." citations are to the appendices to the petition for certiorari.

[2] The defendants sought judgment on the bank holding company–insurance company interlocks on the ground of inapplicability and on an additional ground: It was stipulated that none of the bank holding companies was itself a "competitor" of an interlocking insurance company (App. 54a), and defendants contended that a holding company did not become such a "competitor" merely because its bank subsidiary was one (App. 81a-82a).

The district court granted judgment to defendants, holding that "a normal reading of the statutory language 'two . . . corporations . . . other than banks' compels the conclusion that the statute applies only to two corporations, neither of which is a bank" (App. 56a). Noting that it need go no further (App. 57a), the district court nonetheless reviewed the six decades of administrative and Congressional interpretation of § 8 (App. 58a-61a), the structure of the Clayton Act (App. 61a-65a), and the legislative history of § 8 (App. 65a-77a), and found that all confirmed the conclusion it had reached from "the plain language of the statute" (App. 79a).[3]

The court of appeals reversed, Judge Kennedy dissenting, finding the statutory language at issue "equivocal" and "ambiguous" (App. 8a, 37a) and its legislative history also "ambiguous" (App. 11a). The court instead sought and found its rule of decision in what it termed "the unmistakable general purpose of Congress" (App. 19a), as disclosed in the "less direct evidence" (App. 11a) of the Democratic platforms for the 1908 and 1912 presidential elections, President Wilson's 1912 campaign statements and 1913 inaugural address and general rhetorical statements in Congress about the evils of interlocking directorates (App. 12a-18a). On this ground the court held the provision in question should be treated as if it read "two or more corporations . . . *not all of which are* banks" and thus applied to interlocks between banks and other corporations (*see* App. 8a, 37a).[4]

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[3] The district court also granted judgment in favor of defendants on the bank holding company interlocks, holding that in view of its disposition as to the bank interlocks it need not resolve the question of whether the bank holding companies were "competitors" of the interlocking insurance companies (App. 82a).

[4] The court of appeals reversed on the bank holding company interlocks as well, ruling that a holding company and its subsidiary bank should be treated as a single entity for § 8 purposes (App. 40a).

Rehearing was denied (App. 86a-87a), and this Court granted certiorari on June 1, 1982.

Summary of Argument

The plain language of § 8 does not apply to director interlocks between banks and nonbanking corporations, and the legislative history confirms that the plain statutory language should be given effect. Congress has repeatedly refused to enact the result reached by the court of appeals, and that court's decision is both patent error and a usurpation of the legislative power. This Court should reverse.

ARGUMENT

I.

Section 8 of the Clayton Act Does Not Apply to Common Directors of Banks and Nonbanking Corporations.

A. The plain language of the statute does not cover bank–nonbank interlocks.

The structure of § 8 manifests a clear demarcation of coverage as between banks and other corporations:

What is now the first unnumbered paragraph of the section contains detailed substantive provisions applying to common directors, officers and employees of *banks.*

The second paragraph is a "grandfather" clause (long since expired) applying to *banks.*

The third paragraph authorizes the Federal Reserve Board to enforce "this section," clearly meaning the preceding provisions pertaining to *banks.*

These three paragraphs are the whole of the section's provisions applying to *banks.* The fourth paragraph, a

second detailed substantive provision, applies to common directors of "two or more corporations . . . *other than banks,* banking associations, trust companies and common carriers . . ." (emphasis added).[5]

Construction of the quoted language of the fourth paragraph is the issue in this case. Both on its face and in its context that language is plain—the fourth paragraph has no application to directors of banks. The issue is thereby concluded. *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 197-201 (1976); *United States* v. *Oregon,* 366 U.S. 643, 648 (1961).

The court of appeals' characterization of the words "other than banks" as "equivocal" and its presentation of two interpretations of "equal plausibility" (App. 8a) are an exercise in Orwellian "Newspeak." Indeed, if this language is held "equivocal," one must wonder if it is possible for Congress to legislate other than in an "equivocal" fashion so long as it uses the medium of the English language.

The court of appeals' alternate reading of "equal plausibility"—in which the words "other than banks" become "not all of which are banks"—is not only tortured on its face, but is belied by Congress's demonstration that if that were what it intended it could and would have said so: The phrase "other than banks . . ." is the third of three phrases modifying the words "two or more corporations," and the first of those phrases is *"any one of which* has capital, surplus and undivided profits aggregating more than $1,000,000" (emphasis added). The words "any one of which is other than a bank" would have had the same effect, had

---

[5] Interlocks involving common carriers are dealt with in § 10 of the Clayton Act, 15 U.S.C. § 20 (1976). Those interlocks regulated by § 10 are only a small subset of those excluded from the prohibitions of the "industrial corporations" paragraph.

they been used by Congress, as the court of appeals' words "not all of which are banks." Congress's decision not to employ such language can only be deemed deliberate in light of the language of the paragraph as a whole.

The court of appeals disregarded the plain statutory language so that it might give effect to its view of the "unmistakable general purpose" of the Clayton Act and the "climate of opinion out of which it grew" (App. 19a, 21a), which it found in political party election platforms and speeches of President Wilson (App. 12a-13a). That is not an appropriate exercise of the judicial power.

Statutes regulating complex matters are rarely passed without compromise, *see Mohasco Corp.* v. *Silver*, 447 U.S. 807, 818-19 (1980), *United States* v. *Sisson*, 399 U.S. 267, 297-99 (1970), and this was clearly the case with § 8 (see App. 65a-69a). The ultimate form of legislation often "reflects other, perhaps countervailing purposes than some members of Congress sought to achieve." *Mohasco, supra*, 447 U.S. at 818. A court's task is to give effect to the statute as enacted. *Id.* Judicial revision of a statute's language for the purpose of better achieving supposed legislative ends is improper. *Ernst & Ernst, supra; SEC* v. *Sloan*, 436 U.S. 103, 116-17 (1978); *see Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 647 (1981) (matters of policy are for the political branches); *United States* v. *Sisson, supra*, 399 U.S. at 297-99 (not for the courts to go beyond the limits set by Congress to carry out some "broad policy"); *Ex parte Collett*, 337 U.S. 55, 72 (1949) ("plain meaning" controls; argument that "Congress knew not what it did" rejected).

Congress here said what it meant in plain English, and the court of appeals' refusal to give effect to the statute as written is clear error.

B. The legislative history confirms that Congress meant what it said.

While inquiry into the legislative history of the language in question—"other than banks"— is unnecessary, such an inquiry confirms that these words accurately reflect Congress's intention not to include bank directorships within the scope of § 8's fourth paragraph.

Whether or not interlocks between banks and other corporations with which banks might in some respect compete should be covered by the act was an issue raised early in the legislative process. Mr. Untemeyer, former counsel to the House Committee on Banking and Currency, stated during the initial hearings:

> "I think there is a grave question as to whether a director in a great life insurance company should be a director in a bank. You have failed to cover that feature."

HEARINGS ON TRUST LEGISLATION BEFORE THE HOUSE COMM. ON THE JUDICIARY, 63d Cong., 2d Sess. 823 (1914). The bill that went on to become the Clayton Act, H.R. 15657, was not, however, changed to meet Mr. Untemeyer's objection. The House Report described the interlock provisions of the bill reported to the floor, which did not contain language expressly excluding banks from what became the fourth paragraph of § 8, as follows:

> "This section is divided into three paragraphs, each of which relates to the particular class of corporations described, and *the provisions of each paragraph are limited in their application to the corporations belonging to the class named therein.*
>
> "The first paragraph deals with the eligibility of directors in interstate railroad corporations. . . .

> The second paragraph of the bill deals with the eligibility of directors, officers, and employees of *banks, banking associations and trust companies.*
>
> "The third paragraph of section 9 [now the fourth paragraph of § 8] deals with the eligibility of directors in *industrial corporations* engaged in commerce. . . . In this, as in the preceding paragraph relating to banks, it was not deemed advisable or necessary that interlocking directorates should be prohibited between the smaller industrial corporations."

H.R. REP. No. 627, 63d Cong., 2d Sess. 18-19 (1914) (emphasis added).

The distinction between the banking paragraphs and the "industrial corporations" paragraph existed without the "other than banks" language. Debate in the House recognized this:

> "Mr. Cullop. That [paragraph] refers to some other corporation than a bank. That does not apply to a bank. If the gentleman from Massachusetts and the gentleman from Arkansas will observe, commencing on line 24 of page 29, the language is:
>
> > 'That from and after two years from the date of the approval of this act no person at the same time shall be a director in any two or more corporations, either of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part with commerce.'
>
> "This has no reference to the banking business but to other affairs.
>
> "Mr. Carlin. That related to industrial commerce.
>
> "Mr. Cullop. Yes, that does not relate to banking. That relates to industrial and commercial corpora-

> tions, or institutions of that kind, but *has no reference whatever to the banking business.*"

51 CONG. REC. 9604 (1914) (emphasis added).

The Senate Committee on the Judiciary struck out the entire paragraph relating to interlocking directorates of banks and trust companies, stating that additional regulation of bank directorates should be made by amendment to the banking laws. In contrast, it left the House provision "relating to interlocking directorates of industrial corporations" completely intact. S. REP. No. 698, 63d Cong., 2d Sess. 47 (1914).

The Conference Committee reconciled the different House and Senate versions of the section by restoring, with changes, the House banking paragraph and by adding "banks, banking associations and trust companies" to the "other than common carriers" language already contained in the bill. This set the stage for the following debate in the House:

Representative Mann objected to the Conference Committee's insertion of "banks, banking associations and trust companies" into the "other than" clause, claiming that it was a material change in the wording and, thus, beyond the scope of the Conference Committee's authority. He stated:

> "The House . . . passed section 7 prohibiting interlocking directorates of all corporations having a capital of over a million dollars . . . if it affected competition or they were competitors, and the Senate agreed to identically the same language. . . . What the conferees have done is to eliminate from this section all banking corporations."

51 CONG. REC. 16269 (1914).

Congressman Webb, one of the members of the Conference Committee and one of the bill's managers, responded, *id.* at 16271:

> "The conference . . . put in 'banks and banking associations' in order to make perfectly clear what in my opinion is already clear; because of the preceding paragraph we had passed in a section with reference to interlocking directorates of banks, and there we made the limitation $5,000,000. Now it would be idiotic to say that we included also banks and banking associations in the paragraph referring to industrial corporations; and in order to make the paragraph perfectly plain, we inserted 'other than banks, banks [sic] associations' and common carriers, which had no effect upon the meaning of that section." [6]

Representative Sherley, another supporter of the bill, echoed Mr. Webb's remarks:

> "[T]he conferees inserted in the exclusion proviso what would have been held as excluded in the bill agreed to in conference even if not put there, to wit 'banks, banking associations, and trust companies,' thus making it plain by the very expression itself that they, along with common carriers, were not within the group outlined as industrial corporations."

Id. at 16271-72.

Mr. Mann still insisted that the insertion of the "other than banks" language resulted in a material change in the meaning of the statute:

> "If the language as perfected by the House and the Senate goes into effect *without the change made by*

---

[6] As one of the bill's managers, Mr. Webb's remarks are entitled to weight. *Lewis* v. *United States*, 445 U.S. 55, 63 (1980); *see also Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 215-16 n.25 (1970) (Brennan, J., dissenting).

> *the conferees,* there would be a provision against men acting as directors of a bank and a hat company, if there were any sort of competition. Of course, this bill does not apply to railroad companies [common carriers] engaged in commerce."

Id. at 16272-73 (emphasis added).

The Speaker overruled Mr. Mann, holding that the "subject was lawfully before the conferees." *Id.* at 16273.

As this exchange points out, debate centered on whether bank–nonbank interlocks would have been excluded from the industrial corporations paragraph even if the "other than banks" language had not been added. No one doubted that with such language included the statute permitted such interlocks. Thus, "the legislative history of the . . . statute is entirely consistent with the wording of the statute itself." *Mohasco Corp., supra,* 447 U.S. at 822.

The court of appeals, however, relegated this—the legislative history directly in point—to a footnote and suggested that the purport of Representative Webb's remarks and the Speaker's ruling was that *only* the bank–bank interlocks covered by the preceding paragraphs were excluded from the coverage of paragraph four (App. 28a-29a n. 58). Here again the court of appeals strained to overcome the plain meaning of words with no warrant other than to give effect to what it called the "climate of opinion" out of which the Clayton Act grew (App. 21a), rather than the statute as actually enacted.

Section 8 was not adopted by the 1912 Democratic National Convention, but by Congress. Its terms are the result of extended debate and revision, during the course of which some argued for the most sweeping prohibitions and some questioned

> "whether the Sherman Act, which already forb[ade] such interlocking directorates in its general prohibition of monopoly and restraints of trade need[ed] any reinforcement, and whether th[at] need [wa]s so extreme as to justify eliminating as directors industrial and financial leaders whose advice within the wide field of their experience is most valuable and whose reputation for judgment and integrity insures the confidence of the business community in the corporations which they serve."

H.R. REP. No. 627, *supra*, at 2013 (1914) (minority views on H.R. 15657).[7] The statute's language embodies a middle ground and reflects the accommodation of views made in reaching a legislative consensus, particularly as to banks, which the Senate would have excluded entirely. *See* 51 CONG. REC. 16271-72 (1914). It should not be set aside because a court would have it read differently. As Professor Thomas Reed Powell pointedly observed:

> "Legislation that is the product of compromise preceded by assurances to calm the apprehensions of objectors should be interpreted as a settlement by agreement and not as a dictate of victors. A court may trespass on the legislative field not only by unwarranted denunciation of statutes but also by unwarranted expansion of them."

T. Powell, Note, 58 HARV. L. REV. 1072, 1093 (1945).

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[7] The Minority's reference to the Sherman Act's coverage of interlocking directorates that actually result in anticompetitive conduct demonstrates the fallacy of the court of appeals' reliance on the general proposition that "immunity from the antitrust laws is not lightly implied" (App. 20a). No such question is presented here, for the Sherman Act regulates all interlocks, whether covered by § 8 of Clayton Act or not.

C. For six decades, Congress and all concerned in the administration of § 8 have accepted that the words "other than banks" mean what they say.

While there is, again, no need to proceed further, the court of appeals' rejection of sixty years of common understanding following the passage of § 8—manifested by all concerned and accepted as a predicate for continuing legislative debate and action—was, at the least, cavalier. This Court has cautioned against undue reliance on the views of subsequent Congresses, but they are to be considered if doubt remains after analysis of the statutory language to be construed and its legislative history. *See Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980); *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 596 (1980). In fact, when the precise intent of the enacting Congress is obscure, as the court of appeals erroneously found here, the views of subsequent Congresses "are entitled to significant weight." *Seatrain Shipbuilding Corp., supra.*

Here, the views not only of Congress but also of the enforcement authorities, the business community and the Bar have been uniform for over sixty years: Section 8 "does not apply to interlocks between commercial banks and competing financial institutions, such as mutual savings banks, insurance companies, and small loan companies." Letter from Rep. Wright Patman to Hon. Arthur F. Burns (June 1, 1970), *reprinted in* THE BANKING REFORM ACT OF 1971: HEARINGS ON H.R. 5700 BEFORE THE HOUSE COMM. ON BANKING AND CURRENCY, 92d Cong., 1st Sess. 270-71 (1971); *accord,* STAFF OF ANTITRUST SUBCOMM. OF HOUSE COMM. ON THE JUDICIARY, 89th Cong., 1st Sess., INTERLOCKS IN CORPORATE MANAGEMENT 25 (Comm. Print 1965) ("no prohibition in the statute against . . . either vertical or horizontal, direct or indirect, interlocks between the banking organizations and other types of cor-

porations"); REPORT OF THE FEDERAL TRADE COMMISSION ON INTERLOCKING DIRECTORATES, H.R. DOC. NO. 652, 81st Cong., 2d Sess. 10 (1950); 16C J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 21.03 at 21-15 (1982) (§ 8 "is not generally interpreted as prohibiting interlocks between a banking institution and a business corporation"); *see* Remarks of Hon. Thomas Kauper, Assistant Attorney General, Antitrust Division, *American Metal Market*, July 16, 1974, at 20, col. 3 (§ 8 "may not" apply to bank–nonbank interlocks).

The failure for 60 years of either the Antitrust Division or the Federal Trade Commission to assert the position that the Division here urges is alone a telling admission that such a position is wrong. *See FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513 (1948); *FTC* v. *Bunte Bros.*, 312 U.S. 349, 352 (1941); *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 472-73 (1914).[8]

Moreover, several efforts have been made in Congress to extend § 8's coverage to include bank–nonbank interlocks; all have failed. *See* H.R. 11572, 89th Cong., 1st Sess.

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[8] The court of appeals placed great emphasis on the Federal Trade Commission's decision in *In re Perpetual Federal Savings and Loan Association*, 90 F.T.C. 608 (1977), *vacated*, 94 F.T.C. 401 (1979). The complaint, brought under § 5 of the Federal Trade Commission Act not § 8 of the Clayton Act, charged Perpetual with having six directors who also served on the boards of one or the other of two competing banks. The Commission found that the interlocks in question violated Section 5. Less than a year later, Congress passed the Depository Institution Management Interlocks Act of 1978, discussed *infra*, which prohibited a wide range of interlocks between depository institutions. However, existing interlocks, like the ones at issue in *In re Perpetual* were exempted from the Act's prohibition for a period of ten years. Congress then removed savings and loan associations from the jurisdiction of the Federal Trade Commission. 93 Stat. 95 (1979) (codified at 15 U.S.C. 45(a)(2) (Supp. IV 1980)). The Commission was forced to vacate its order. 94 F.T.C. 401 (1979).

(1965); H.R. 2509, 90th Cong., 1st Sess. (1967); H.R. 3245, 92d Cong., 1st Sess. (1971); H.R. 13581, 93d Cong., 2d Sess. (1974); H.R. 14997, 93d Cong., 2d Sess. (1974); H.R. 4406, 94th Cong., 1st Sess. (1975). Similarly, H.R. 5700, 92d Cong., 1st Sess. (1971), which would have prohibited, *inter alia*, interlocks between insurance companies and banks, was allowed to die in committee after hearings were held. In each instance Congress rejected the change in law and practice here ordained by the court of appeals.

Congress has, however, enacted subsequent legislation based on its understanding that § 8 does not apply to interlocks between banks and other corporations. The Banking Act of 1935 revised § 8 and "made [it] apply to all member banks [of the Federal Reserve System]." H.R. REP. No. 742, 74th Cong., 1st Sess. 24 (1935). Section 8 did not apply to state banks before the Banking Act was passed; the change which "made" § 8 apply to state banks was to the banking provisions, not to the "industrial corporations" paragraph.

Congress undertook a more comprehensive review of interlocks between competing financial institutions in 1978, and concluded, in the words of the relevant House Report:

> "[E]xisting law dealing with interlocking directorships among financial institutions is outdated. . . . *The current proscriptions apply only to banks* and are tied to an outmoded concept of market area."

H.R. REP. No. 1383, 95th Cong., 2d Sess. 14, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 9273, 9286 (emphasis added).

Based on this common understanding, Congress enacted the Depository Institution Management Interlocks Act ("DIMIA"), 12 U.S.C. §§ 3201-3207 (Supp. IV 1980). The

Act "expand[ed] the present prohibition on bank to bank interlocks to include interlocks between all kinds of depository institutions—banks, savings and loan, credit unions, mutual savings banks, and their holding companies." H.R. REP. No. 1383, *supra,* at 14.

The DIMIA prohibits a director or other "management official" of one depository institution from serving as such for another depository institution within the same standard metropolitan statistical area, except in the case of depository institutions with less than $20,000,000 in assets, where the prohibition only extends to the same, or an adjacent, city, town, or village. Additionally, the Act prohibits a management official of a depository institution or holding company with assets exceeding *$1 billion* from serving as a management official of a depository institution or holding company with assets exceeding *$500 million*. Congress chose, once again, to leave interlocks between banks and non-depository institutions unregulated. Efforts to extend the DIMIA to cover other financial institutions, such as insurance companies, were defeated in committee. H.R. REP. No. 1383, *supra,* at 200-201 (additional views of Rep. St. Germain).[9]

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[9] The reasons for the committee's rejection of proposals to further extend the statute's coverage are readily apparent from the minority report:

> "The primary concern of the minority with regard to this title has been to make certain that the conflicts of interest involved in some interlocking directorates will be adequately regulated. However, it is also imperative that the legislation permit sufficient flexibility to allow the vast pool of expertise available in the financial community to work together in a procompetitive atmosphere. The minority believes that these two goals have been achieved in this bill."

H.R. REP. No. 1383, *supra,* at 238, 241 (minority views on H.R. 13471).

The DIMIA contains certain statutory exemptions and authorizes five regulatory agencies[10] to promulgate rules and regulations, "including rules and regulations to permit interlocks which would otherwise be prohibited." *See* H.R. REP. No. 1383, *supra,* at 15. More importantly, the DIMIA "grandfathers" legally existing interlocking directorates for a period of 10 years from the date of its enactment. *See id.*

In contrast, the court of appeals' decision would immediately make all bank-nonbank interlocks illegal, if there were competition between the firms, so long as one of them had capital, surplus and undivided profits aggregating *$1 million.* The decision renders surplusage those portions of the DIMIA that deal with director interlocks between banks and other depository institutions, and flies in the face of Congress's careful and detailed treatment of interlocks among financial institutions.

In sum, Congress plainly excluded banks from the coverage of the fourth paragraph of § 8 in 1914, and it did so advertently. In 1978, Congress addressed the question of interlocking directors among banks and other financial institutions and chose to regulate such interlocks in detail, but only insofar as the institutions involved were depository institutions, which insurance companies are not. The court of appeals' decision rejects what Congress has done in favor of what the court appears to believe Congress ought to have done. That is error and must be reversed.

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[10] The Board of Governors of the Federal Reserve System, the Federal Home Loan Bank Board, the Comptroller of the Currency, the Board of Directors of the Federal Deposit Insurance Corporation, and the National Credit Union Administration.

The Federal Reserve Board, which is the sole agency charged with enforcement of the banking provisions of § 8, now considers those provisions superseded by the DIMIA. *See* 12 C.F.R. 212.7 (1982),

II.

Section 8 Likewise Has No Application to the Bank Holding Company–Insurance Company Interlocks Challenged in this Case.

The subsidiary issue of § 8's application to the challenged bank holding company interlocks does not require extended consideration. The court of appeals held that the § 8 status of the petitioner bank holding companies was the same as that of their subsidiary banks, adopting a Federal Reserve Board ruling that a holding company and its bank subsidiaries should generally be considered a "single entity" for § 8 purposes (App. 38a-40a). The district court did not reach that question (App. 82a), and this Court need not do so.

If banks are not subject to the "industrial corporations" provision—as clearly they are not—then the challenged interlocks of their parent bank holding companies are not prohibited by that provision whatever view is taken of the "single entity" theory: If the theory is accepted, then the petitioner bank holding companies are "banks" not subject to the provision; if the theory is rejected, then they are not "competitors" of the interlocking insurance companies, since their alleged status as such is wholly dependent upon the "single entity" theory.[11] Only if banks were erroneously held subject to the "industrial corporations" provision, would the Court have occasion to reach the additional defense interposed by the bank holding companies—that they are not "competitors" of the interlocking insurance companies merely by virtue of their subsidiary banks' status as such (App. 37a-38a, 82a). *See Kennecott Copper Corp.* v. *Curtiss-Wright Corp.*, 584 F.2d 1195, 1205 (2d Cir. 1978) (parent not a competitor merely because subsidiary is).

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[11] It is stipulated that neither the holding companies nor any of their nonbank subsidiaries competes with the interlocking insurance companies (App. 54a).

Conclusion

For the reasons stated, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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v.

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF OF AMERICAN COUNCIL OF LIFE INSURANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether an interlocking of directors between a bank and an insurance company is prohibited by Section 8 of the Clayton Act which prohibits director interlocks between "two . . . corporations . . . other than banks."

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---

BRIEF OF AMERICAN COUNCIL OF LIFE INSURANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

This brief is filed on behalf of the American Council of Life Insurance in support of Petitioners. Consent from counsel for both sides has been filed with the Clerk of this Court.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 656 F.2d 428. A copy of the opinion is reproduced in the Appendix to the Petition. The opinion of the United States District Court for the Northern District of California is reported at 422 F. Supp. 686; it is set forth in the Appendix to the Petition.

JURISDICTION

As shown in the Appendix to the Petition, the judgment below was entered on September 14, 1981 and a petition for rehearing was denied on November 10, 1981. The Petition for Certiorari was granted on June 1, 1982. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 8 of the Clayton Act, 15 U.S.C. §19, is set forth in its entirety in the Appendix to the Brief for the Petitioners. In pertinent part, Section 8 provides:

> No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

INTEREST OF THE AMICUS

The American Council of Life Insurance ("Council") is a nonprofit association representing the interests of 550 member life insurance companies including most of the major life insurers in the United States. Its members currently hold more than ninety-five percent of the life insurance in force in legal reserve life insurance companies in the United States. The Council has a strong interest in the present case because if simultaneous service on bank and insurance company boards is to become a forbidden practice, a major overhaul of existing insurance boards will be necessary.

A Congressional staff report published in 1968 identified 146 interlocking directors between 29 of the 50 largest insur-

ance companies and 49 banks surveyed in 10 metropolitan areas.[1] The district court found that forty percent of all insurance company directors were also directors of banks as of the time of trial, 422 F. Supp. at 691; a Senate staff study conducted in 1980 shows the continuing prevalence of such interlocks.[2] Our own recent survey of member companies produced the following data:[3] (1) 79 percent of the Council's membership reported having directors who are also directors of banks; (2) of those companies reporting interlocks with banks, on the average 33 percent of their boards are comprised of bank directors; and (3) 80 percent of the parent corporations of member companies have directors who are also directors of banks. Moreover, neither the existence nor the extent of the practice is a recent development: member company records show simultaneous service on bank and insurance boards before and after the Clayton Act without interruption.

On insurance boards, interests and responsibilities may be specialized among the members of the board, who are often organized into committees to allow proper attention to the wide range of matters which are properly the subject of a board's attention. Particular directors, and particularly, groups of directors, are not likely to be fungible: the need to replace as much as a quarter or even a third of the board may well be a need to replace all of its expertise and experience in one or more areas of concern.[4]

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[1] Staff of the Subcomm. on Domestic Finance of the House Comm. on Banking and Currency, 90th Cong., 2d Sess. *Report on Commercial Banks and their Trust Activities: Emerging Influence on the American Economy* 3 (Subcomm. print 1968).

[2] Staff of the Senate Committee on Governmental Affairs, 96th Cong., 2d Sess., *Institutional Shareholders and Interlocking Directorates Among Major U.S. Corporations* (1980).

[3] 304 member companies including the major life insurers responded to the Council's survey.

[4] For example, in a partial survey of some of the major life insurance companies, the Council has found that the need to replace roughly fifty percent of their directors who are also bank directors would result in a need to replace a greater percentage of the directors on important board committees —as much as eighty percent on the committees of some companies, e.g., the audit committees. *See also* S. Middlebrook, "The Role of the Outside Director," 1978 Proc. Legal Sec. Am. Council of Life Ins. 15, 34-35.

During the hearings on the Banking Reform Act of 1971, H.R. 5700, 92d Cong., 1st Sess. (1971) (a bill that would have explicitly prohibited a director interlock between an insured bank and insurance company had it not died in committee), spokesmen for the insurance industry testified that one of the most important functions of a life insurance company is the investment of the funds underlying its commitments to policyholders. Therefore, it was essential that the company and its policyholders have, through its board of directors, the counsel and judgment of individuals with broad experience in the field of business and finance.[5] Because of their diverse backgrounds and familiarity with financial matters such as the maintenance of reserves and liquidity, bank directors are especially qualified to serve as directors of insurance companies. The Council and its members are concerned about the legal status of current boards of directors, about the continued smooth functioning of those boards, and ultimately about the effective and wise management of these companies.

STATEMENT

In this case the Justice Department seeks to enlarge Section 8 of the Clayton Act, 15 U.S.C. § 19, which prohibits a director from serving on the boards of competing corporations "other than banks," by attacking a director interlock between a bank and an insurance company. The goal is to outlaw a common practice that went completely unchallenged during the more than sixty years between the passage of the Clayton Act and the initiation of this suit.[6]

In summary, the government's arguments are: that a policy case can be made for prohibiting shared directors between banks and insurance companies; that certain individuals who supported Section 8 in the enacting Congress supported such a prohibition as well; that the words of the statute can be

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[5] Hearings before the Committee on Banking and Currency, H.R. 5700, 92d Cong., 1st Sess. 480 (1971).

[6] "[T]hese instant cases represent the first time, since section 8 was enacted over 60 years ago, that the Justice Department has attacked a bank/non-bank interlock of the type now being challenged." *United States v. Crocker National Corp.*, 422 F. Supp. 686, 691 (N.D. Cal. 1976).

stretched far enough to make such a prohibition "plausible"; that expansive interpretation of the antitrust laws should be given the benefit of the doubt; and that sixty years of contrary history, including explicit legislative and executive disavowals of such a prohibition, are irrelevant. But the government's attempt to enlarge Section 8 distorts the Section's words and its history, and ignores the government's own primary responsibility of fidelity to the limits of the power which Congress has granted.

The District Court Opinion

The district court decided that Section 8 does not apply to simultaneous service on the boards of banks and non-bank corporations; its reasoning was based upon the structure and wording of the statute, the legislative history of its enactment, the contemporaneous understanding of its scope, and the consistent and long-continued legislative and administrative interpretation of this understanding. Parsing together the wording of the statute "any two . . . corporations . . . other than banks" the district court below concluded that an ordinary reading of the statutory prohibition indicated that it applied only to two corporations neither of which is a bank. 422 F. Supp. at 689-90. The court thoroughly reviewed the relevant legislative history of Section 8 and found that it confirmed this reading,[7] and further noted that "[m]ore than 60 years of administrative interpretation and Congressional action confirmed the conclusion that banks were not to be subject to this prohibition." 422 F. Supp. at 690.

The Court of Appeals Reversal

The court of appeals reversed in a two-to-one decision with Judge Kennedy dissenting. Saying that the government's construction of the language of the provision was "plausible," and finding the language of the exclusion "ambiguous," the

[7] "[T]here is not one statement by anyone in Congress that supports the Government's argument that the 'other than banks' language meant only to exclude bank/bank interlocks but not bank/non-bank interlocks."

422 F. Supp. at 700.

majority opinion turned to its perception of the broad general purpose of Section 8—the "less direct evidence" of legislative intent. 656 F.2d at 434-35. The general purpose of the Clayton Act, to supplement the Sherman Act in strengthening and fostering competition, and President Wilson's support for legislation regulating interlockings of directors, were emphasized. The court noted in particular the strength of the Congressional disapproval of interlocking directorates among competitors demonstrated in the *per se* prohibition embodied in Section 8.

Relying on the language in *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 349, that an "unmistakable directive" is required to construe an antitrust statute "counter to the broad goals" of maximum competition (*citing United States v. Philadelphia National Bank*, 374 U.S. 321, 348; *see also Group Life and Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 231) and approaching the interpretation of the "other than banks" language as a question of implied immunity from the antitrust laws, the court of appeals found that the broad policies of the Clayton Act required prohibition of bank/non-bank interlocks.[8]

This Court granted ceriorari to review the decision below on June 1, 1982.

SUMMARY OF ARGUMENT

The essential question in this case is whether the government can broaden the statutory prohibition on interlocking directorates in Section 8 of the Clayton Act to include bank/non-bank interlocks. To do so the government must not only recast the words of the statute, it must also ignore the understanding of both the Congress that passed the statute and all of those—government and private—who operated under the statute in the sixty years between its passage and the initiation of this suit. The direct evidence of legislative intent—statutory

[8] Judge Kennedy emphasized that a broad and simple formulation of a purpose to promote competition was insufficient justification to extend Section 8 beyond the historical limits of its specific language and characterized the majority's strained efforts to do so, as only serving "to highlight and underscore the existence of a legislative intent to compromise and to narrow the statutory coverage." 656 F.2d at 456.

language, legislative history, Congressional and administrative interpretation and action—confirms what more than sixty years of Justice Department acquiescence implies: the prohibition of interlocking directorates in Section 8 does not apply to a bank/non-bank interlock.

1. The critical jurisdictional phrase defines the reach of the statute to proscribe interlocks between "two or more corporations . . . other than banks." The natural, straightforward, common sense reading of Section 8 would exclude interlocks involving a bank. Generally, legislative terms phrased in the plural include the singular, 1 U.S.C. § 1, and the compartmentalized structure of the statute indicates that interlocks involving a bank were covered exclusively by a different paragraph. Common carrier interlocks were excluded in the same way in the same language.

2. The specific consideration of bank/non-bank interlocks in the legislative process is inconsistent with the strained prohibition which the government infers. Congress did not outlaw all interlocks to the extent of its jurisdiction nor all interlocks which might be found anticompetitive; rather Congress enacted as a compromise a far more limited and specific statute. The present stance of the Justice Department should not be adequate ground for ignoring the compromise, and changing the law. *Moragne v. State Marine Lines*, 398 U.S. 375; *United States v. Cooper Corp.*, 312 U.S. 600.

3. In rejecting the contemporaneous and long-continued interpretation of Section 8 in favor of its current policy predilections, the Justice Department has exceeded its authority and distorted the meaning of the statute. *See United States v. Clark*, No. 80-1121 (Jan. 12, 1982); *Bryant v. Yellen*, 447 U.S. 352, *Zenith Radio Corp. v. United States*, 437 U.S. 443. Explicit Congressional, administrative, and practical interpretations confirm the exclusion of bank/non-bank interlocks (*Andrus v. Shell Oil Co.*, 446 U.S. 657; *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572); indeed, the complete absence of any enforcement action against such a highly public, widespread practice during the past sixty years is perhaps the most convincing corroboration of the common understanding that Congress did not confer the authority the government now asserts. *Federal Power Commission v. Panhandle Eastern Pipe*

Line Co., 337 U.S. 498; *Federal Trade Commission v. Bunte Bros.*, 312 U.S. 349.

4. The government cannot rely on a broad Congressional policy judgment outlawing interlocks in order to enlarge the statute. Some interlocks were outlawed and others were not. The parameters of the prohibition are positive and empirical, not open-ended, subjective, or based on evolving policy judgments. *Compare National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 688 (applying Section 1 of the Sherman Act); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 748 (applying Section 10(b) of the Securities Exchange Act of 1934). There is no exemption from the substantive contraints of the antitrust laws involved here, *see United States v. Philadelphia National Bank*, 374 U.S. 321, only a straightforward issue of statutory construction which the government should not be allowed to take beyond the words as written and long understood.

ARGUMENT

I. Section 8 Excludes the Interlocks Challenged Below in Straightforward Language.

In Section 8, as elsewhere, the words of a statute are to be given their ordinary meaning unless otherwise defined, *Diamond v. Chakrabarty*, 447 U.S. 303, and in the absence of a "clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108. The proper construction of a statute must begin with the language of that statute and work out to a result. The district court followed this salutary principle but the appellate court turned it around. In Section 8 the words themselves and their place in the statute make it clear that bank/non-bank interlocks are not in the proscribed category.

At issue in this case is the language contained in the fourth paragraph ("competing corporations" paragraph) of Section 8: "[N]o person at the same time shall be a director in any two or more corporations . . . other than banks, banking associations,

trust companies and common carriers." Reduced to its simplest form, the question in this case is whether an insurance company and a bank are "two or more corporations . . . other than banks."

At the trial below both parties agreed that the exclusionary clause "other than banks" modified the phrase "any two or more corporations." 422 F. Supp. at 690. Since "other" modifies "two or more corporations" without qualification, and both "two" and the "other" phrase modify corporations, a natural and straightforward reading of the language would be that *both* corporations joined in an interlock must be "other than banks" for the provision to apply. *See also* 16C J. Von Kalinowski, Antitrust Laws and Trade Regulation § 21.03 at 21-14 (1982) (Section 8 not generally interpreted to prohibit bank/non-bank interlocks). This natural and practical conclusion is strengthened by Section 1 of Title 1 of the United States Code which expressly provides that in construing any Act of Congress, "unless the context indicates otherwise—words importing the plural include the singular." 1 U.S.C. § 1. This section embodies the general principle of statutory construction that legislative terms which are plural in form contemplate the singular object as well unless otherwise indicated. *See* 2a Sands, Sutherland Statutory Construction § 47.34 (4th ed. 1973). In the present case, moreover, the conclusion may be tested against grammar and sense by attempting to construct a statement containing "two, other than ____s" which would naturally be construed as "two, one of which is other than a ____."

The appellate court bypassed the ordinary reading of the statute to construct a "plausible" interpretation of "other than banks" to mean "not all of which are banks." 656 F.2d at 434. With all respect, this construction is only plausible if one is determined not to let syntax interfere with supposed policy. This interpretation was the latest of several government reconstructions of the meaning of the words—all based on the theory that the fourth paragraph of the section is a catch-all which in some way takes up where the other paragraphs leave off. The most significant problem with this interpretation, aside from the violence it does to the natural sense of the words, is the

common carrier exclusion. The wording of the common carrier exclusion is exactly the same —"two or more corporations . . . other than banks . . . and common carriers,"—and it is well established that the common carrier provision means that the paragraph does not apply if either of the corporations is a common carrier. *See* 422 F. Supp. at 695.[9]

> It is a settled principle of statutory construction that "[w]hen the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be construed to have the same meaning in the next place."

United States v. Nunez, 573 F.2d 769, 771 (2d Cir.), *cert. denied*, 436 U.S. 930 (1978); *Meyer v. United States*, 175 F.2d 45, 47 (2d Cir. 1949), *quoting Lewellyn v. Harbison*, 31 F.2d 740, 742 (3d Cir. 1929).

The government and the court of appeals dismissed this consideration because the treatment of banks and the treatment of common carriers arose at different stages of the legislative process and were proposed, according to the court of appeals' version of history, for different reasons. Whether or not there was a significant difference in the Congressional motivation behind the two exclusions, and whether or not there was a difference in how and when the exclusions were proposed, Congress treated the two exclusions the same *in the language* without any clue indicating the dramatic difference in meaning the government supposes. Any hypothesis of construction which relies on misleading or secretive statutory draftsmanship, and then makes the secret rather than the statute the law, must bear a heavy burden of justification. As this Court said in

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[9] *See* Report of the House Committee on the Judiciary (Minority Views), H.R. Rep. No. 627, Pt. 2, 63d Cong., 2d Sess. at 8 (1914). 51 Cong. Rec. 14256 (1914) (remarks of Senator Cummins):

> I think the section [competing corporations paragraph] very wisely excludes common carriers, because they ought to be dealt with elsewhere.

See also 51 Cong. Rec. 16271 (1914) (remarks of Representative Webb); 51 Cong. Rec. 16272 (1914) (remarks of Representative Mann); 656 F.2d at 442-43.

Lynch v. Alworth-Stephens Co., 267 U.S. 364, 370, "the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."

Moving from the words to their statutory setting, one finds further confirmation of the conclusion that bank/non-bank interlocks were excluded from the Section 8 prohibition. The statutory structure of the Clayton Act reflects a Congressional decision to enact a highly selective and specific regulatory scheme dealing with three classes of business organizations—common carriers, banks and industrial corporations. The House Report [10] accompanying the Clayton Bill explains this:

> [Section 9] is divided into three paragraphs, each of which relates to the particular class of corporations described, and *the provisions of each paragraph are limited in their application to the corporations belonging to the class named herein.*
>
> The first paragraph deals with the eligibility of directors in interstate railroad corporations . . . .
>
> The second paragraph of the bill deals with the eligibility of directors, officers, and employees of banks, banking associations, and trust companies . . . .
>
> The third paragraph of section 9 deals with the eligibility of directors in industrial corporations engaged in commerce. [Emphasis added.][11]

Report of the House Committee on the Judiciary, H.R. Rep. No. 627, Pt. 1, 63d Cong., 2d Sess. at 18-19 (1914), *reprinted in*

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[10] When the Clayton Bill (H.R. 15657) was originally reported in Congress all of the interlocking directorate prohibitions were contained in the same section (then numbered 9). The provision dealing with vertical common carrier interlocks was renumbered section 10 when the bill was reported by the Senate.

[11] As the Clayton Bill was enacted, the competing corporations paragraph at issue here became the fourth paragraph of Section 8. Throughout this brief reference to the fourth paragraph is used to identify the competing corporations paragraph.

2 Kintner, The Legislative History of the Federal Antitrust Laws and Related Statutes at 1098-99 (1978).

The interlocking directorate provisions were structured in separate paragraphs to indicate that each paragraph applied to the directors of a particular class of business organization.[12] Note also that in the report the prohibition is phrased in terms of the eligibility of the directors. Thus as a director of a bank, one's eligibility is governed by the second paragraph while as a director of an industrial corporation other than a bank or common carrier, one's eligibility is governed by what was then the third and is now the fourth paragraph. The apparent

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[12] Throughout the legislative history—the House Report, Senate Report, floor debates in the House and Senate—the competing corporations paragraph was uniformly described as dealing with the eligibility of directors in "industrial" corporations, a term which was understood and intended to exclude banks. For example, during the House debates Representative Floyd asserted that a part of the competing corporations paragraph describing the mechanics of calculating aggregate capitalization would cover a situation involving bank interlocks. However, as the following colloquy plainly shows, the competing corporations paragraph does not apply to an interlock involving a bank:

> Mr. Cullop: That refers to some other corporation than a bank. Commencing on line 24 of page 29, the language is—
>
> That from and after two years from the date of the approval of this act no person at the same time shall be a director in any two or more corporations, either of which has capital, surplus, and undivided profits aggregating more than $1,000,000 engaged in whole or in part in commerce.
>
> This has no reference to the banking business, but to other affairs.
>
> Mr. Carlin: That relates to industrial commerce.
>
> Mr. Cullop: *Yes. That does not relate to banking. That relates to industrial and commercial corporations, or institutions of that kind, but has no reference whatever to the banking business.* [Emphasis added.]

51 Cong. Rec. 9604 (1914). Although the court of appeals dismissed this colloquy as "incidental" and "ambiguous," it would seem to reflect an explicit consideration of the very problem faced here. The colloquy is especially significant since it focuses on the interplay of the bank interlock provisions of Section 8 with the competing corporations paragraph and plainly indicates that a bank does not fall within the coverage of the competing corporations paragraph. Representatives Carlin and Floyd were two of the three framers of the Clayton Bill, 51 Cong. Rec. 9156 (1914), and their views are entitled to great weight.

meaning is that eligibility in one category or paragraph does not affect eligibility in another, and that in the fourth paragraph eligibility is affected only by the simultaneous service on the boards of two corporations of the category covered by that section. The government's case depends on this paragraph operating as a catch-all provision, but there is no language in any of the paragraphs which indicates that this is a residual provision designed to catch any interlock not otherwise regulated, and there is no statement to this effect in the legislative history.[13] *See infra* pp. 17-18.

II. The Legislative History of Section 8 Confirms the Language and Should Be Persuasive.

A. The Absence of Any Legislative Response to Specific Suggestions That Bank/Non-Bank Interlocks Be Covered Corroborates the Conclusion That Coverage Was Not Intended.

The "plausibility" of the court of appeals' reading of Section 8 diminishes even further when the investigation broadens to include the legislative history. In light of the apparent exclusion of bank/non-bank interlocks in the statutory language, the most compelling circumstance of the legislative history is that coverage of such interlocks was specifically and repeatedly raised as an issue before Congress, but no language was ever adopted to extend coverage in this way, and there is no statement by any member of Congress which indicates that such coverage was ultimately intended. 422 F. Supp. at 700. On the contrary, the legislative history has many indications that the enacting Congress did not understand Section 8 to cover bank/non-bank interlocks.

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[13] The assertion of the court of appeals that the individual paragraphs are not compartmentalized rests on its observation that the common carrier provisions regulating vertical interlocks reach other corporations. 656 F.2d 443-44. However, the court did not note that the paragraph dealing with vertical interlocks among common carriers by necessity applies to a common carrier, and the scope of the prohibition is compartmentalized in this sense. Thus, as structured, each paragraph pertains to a certain class of business organization and is limited in its application to interlocks involving corporations in the named class.

The government impressed the court of appeals below with President Wilson's campaign intentions, Louis D. Brandeis' specific condemnation of bank/non-bank interlocks, and the Pujo Commission's identification of the supposed evils of such interlocks, but this history undercuts the government's position.[14] All of it preceded the legislative process, of course, and no one contends that Section 8 was a perfect transcription of Wilson's, Brandeis', or the Pujo Commission's wishes. More importantly, the specific identification of the issue is inconsistent with an argument that Congress then dealt with that issue in a manner so vague and implicit that a "plausible" reading sixty years later was necessary to unearth its intent.

B. The Compromise Reflected in the Legislation Must Be Respected.

Rather than adopt an absolute prohibition against all interlocking directorates, Congress addressed the issue in specific terms. Common carriers, banks, and corporations other than banks were dealt with on an individual basis and various requirements such as size limitations, minimum capitalization requirements, vertical buyer-seller relationships, etc., were written into the statute. Congress rejected various attempts to broaden the statute. It did not prohibit horizontal common

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[14] When the first and most sweeping of the various versions of Section 8 was introduced in 1914, Samuel Untermyer, counsel to the Pujo Commission, objected that the draft as a whole was too radical to work but voiced concern about the exclusion of bank/non-bank interlocks: "I think there is a grave question as to whether a director in a great life insurance company should be a director in a bank. You have failed to cover that feature." Hearings on Trust Legislation before the House Committee on the Judiciary, 63d Cong., 2d Sess. at 823 (1914) ("Trust Hearings"). Mr. Brandeis criticized the narrowness of the pending bill and urged the committee to draft legislation prohibiting not only interlocking directorates but also "dealings" between corporations within the same prohibition. Trust Hearings, *supra* at 681. Regarding bank interlocks, Brandeis also urged a prohibition against an interlock between a bank and a "financial concern" and specifically defined "financial concern" to include an insurance company. "I should say that term 'financial concern' includes not only a bank . . . [but] an insurance company also. It seems to me that both banks and insurance companies . . . ought to be included in that prohibition." Trust Hearings, *supra* at 925. Yet despite these specific urgings for a more inclusive bill, Congress never adopted one.

carrier interlocks, nor did it apply the prohibition to a bank and a "financial concern."

The government and the court of appeals below ignore the truism that all legislation reflects compromise, and thus distort the history of Section 8 into the triumph of an inclusive single-minded purpose. Examination of the history of Section 8 shows something far different: a wide variance of views of the desirability and extent of any prohibitions of interlocks involving banks, a compromise which provided for a well-defined and selective approach to the prohibition of interlocks, and an explicit record of rejection of any inference that bank/non-bank interlocks were to have been covered. To explain all of this away by reference to the all-inclusive purpose of the statute is merely a circular evasion. As this Court has said:

> The legislature does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect . . . . The legislature may, in order to promote other, conflicting interests, prescribe with particularity the compass of the legislative aim, erecting a strong inference that territories beyond the boundaries so drawn are not to feel the impact of the new legislative dispensation.

Moragne v. State Marine Lines, 398 U.S. 375, 392.

The wide divergence of views concerning how far to proceed against interlocking directors became clear when the Senate flatly rejected and struck out all of the House's provisions dealing with bank interlocks:

> A Senate amendment to this section strikes out the entire paragraph which relates to interlocking directorates of banks and trust companies. In proposing this amendment a majority of the Committee believed that such legislation as this more properly belongs to the domain of banking rather than commerce.

Report of the Senate Committee on the Judiciary S. Rep. No. 698, 63d Cong., 2d Sess. at 48 (1914). The Senate position was

clear that Section 8 would not be applied to banks and every reference to a bank was stricken from the text.[15]

The conference committee persuaded the Senate to accept a provision regulating bank interlocks by drafting compromise legislation. Representative Webb explained the conferee's compromise measures:

> As to banks the House passed a provision forbidding interlocking directorates of banks that had more than $2,500,000 deposits, capital stock, surplus, and undivided profits. The Senate struck out entirely our paragraph of section 9 with reference to banks . . . . We restored in almost identical language the reference to banks, only increasing the limit from $2,500,000 as it passed the House, to $5,000,000, but in the very next paragraph we *provide with reference to industrials that $1,000,000 shall be the limitation, and that it shall not apply to banks, banking houses, or common carriers.* [Emphasis added.][16]

51 Cong. Rec. 16271 (1914).

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[15] Significantly, however, the competing corporations paragraph remained unchanged. *See* S. Rep. No. 698, 63d Cong., 2d Sess. 48 (1914). In light of the consensus opposition in the Senate toward regulating any bank interlocks, it is clear that the Senate also viewed the competing corporations paragraph as applying to industrial corporations and not banks. The Senate also substantially narrowed the provisions dealing with vertical common carrier interlocks by rejecting the absolute prohibition in the House bill. *Id.* at 47-48. The Senate's substitute paragraph permitted certain vertical common carrier interlocks under circumstances that provided for competitive bidding.

[16] The Senate's acceptance of the provision prohibiting bank interlocks was conditioned on raising the size limitation from $2,500,000 to $5,000,000. The government's construction of Section 8, however, would give no recognition to this political compromise and would produce the anomalous result of subjecting virtually every bank in the country to the prohibitions contained in section 8 regardless of its size. Under the competing corporations paragraph of Section 8, only one of the corporations must have capital, surplus, and undivided profits aggregating more than $1,000,000. Therefore, the government's construction would dramatically enlarge Section 8 by granting the government a free rein to prosecute any bank/insurance company interlock so long as the insurance company had capital, surplus, and undivided profits aggregating $1,000,000 and was in competition with a bank.

C. Specific Consideration of the Issue Reflects a Decision Not To Cover Bank/Non-Bank Interlocks in the Fourth Paragraph of Section 8.

At the culmination of the legislative process, the floor debate on the adoption of the compromise, the issue of bank/non-bank interlocks was again specifically raised, and specifically put to rest. The "other than banks" language had been added to Section 8 by the conference committee, and Representative Mann raised a point of order alleging that the conference committee had exceeded its jurisdiction by inserting new matter which had the effect of excluding bank/non-bank interlocks from the competing corporations paragraph. Representative Mann argued that "[w]hat the conferees have done is to eliminate all banking corporations." 51 Cong. Rec. 16269 (1914). Representative Webb, the bill's sponsor, explained that the conferees had indeed not exceeded their jurisdiction because the competing corporations paragraph as it passed the House and the Senate was "never intended" to apply to banks.[17] Representative Sherley concurred:

> To say that it was not within the province of the conference to make it clear that only certain banks should be within the provision touching certain interlocking directorates, and that the provision touching industrial corporations was confined to such industrial corporations and should not by any stretch of construction be held to include banks, is to say what seems to be contrary, as the gentleman from North Carolina [Rep. Webb] says, to the plain common sense of the situation.

51 Cong. Rec. 16272 (1914).

In a question directed to Representative Mann, Representative Diffenderfer specifically focused on the bank/non-bank interlock issue and the effect of the conferees' bill (which included the "other than banks" clause) "where a large

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[17] Mr. Webb: Now Mr. Speaker, my friend from Illinois [Mr. Mann] will admit without question that the third paragraph of Section 9 [competing corporations paragraph] was never intended to apply to banks, because we had an express paragraph in Section 9 which took care of interlocking directorates in banks. 51 Cong. Rec. 16271 (1914).

banking institution has directors who are also directors of a large hat-manufacturing institution." 51 Cong. Rec. 16272 (1914). Representative Mann's answer demonstrates the understanding that banks were ultimately excluded from the coverage of the paragraph:

> [I]f the language as perfected by the House and the Senate goes into law without the change made by the conferees, there would be a provision against men acting as directors of a bank and a hat company if there were any sort of competition.

51 Cong. Rec. 16272-73. Representative Mann's point of order was overruled and the bank exclusion was retained in its present form, the form proposed by the conferees. 51 Cong. Rec. 16273 (1914).[18]

These statements and discussion demonstrate that the issue here was specifically raised and that all who addressed it shared a common understanding that the final version of paragraph four completely excluded interlocks involving banks. The floor managers of the bill as well as Representative Mann, who opposed the exclusion, agreed on this much in open debate. The vote adopting the bill took place the next day. 51 Cong. Rec. 16344 (1914). To dismiss this discussion as having "little weight," as did the court of appeals (656 F.2d at 445-46), is simply to ignore Congress' clearly expressed understanding of what it passed.

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[18] Representative Sherley's rejoinder to the Mann point of order is particularly instructive here since it addresses the future construction of Section 8 by a court:

> [The conferees] concluded that it would leave no matter of argument touching the language of Section 7 [now 8], and therefore the conferees inserted in the exclusion proviso what would have been held as excluded in the bill agreed to in conference even if not put there, to wit, "banks, banking associations, and trust companies," thus making it plain by the very expression itself that they, along with common carriers, were not within the group outlined as industrial corporations.

51 Cong. Rec. 16272 (1914).

III. The Consistent History of Government Action and Business Practice Under Section 8 Confirms the Exclusion From Coverage of Bank/Non-bank Interlocks.

Despite the early origin, the wide prevalence and the steady continuity of interlocks between banks and insurance companies, the Justice Department admittedly has not until now challenged the practice.[19] In *Federal Trade Commission v. Bunte Bros.*, 312 U.S. 349, this Court rejected a similar attempt by the Federal Trade Commission to enlarge its enforcement authority under Section 5 of the Federal Trade Commission Act beyond the historical limits implicit in 25 years of inaction.

> That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent on control over intrastate transactions. Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred. *See Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315.

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[19] The appellate court and trial court below found that forty percent of all insurance company directors were also directors of banks. 656 F.2d at 433. The continuing prevalence of the practice has been documented in House staff reports published in 1967 and 1968 and most recently in a Senate staff study conducted in 1980. *See* Staff of the Subcomm. on Domestic Finance of the House Comm. on Banking and Currency, 90th Cong., 1st Sess., *Control of Commercial Banks and Interlocks Among Financial Institutions* (Subcomm. print 1967); Staff of the Subcomm. on Domestic Finance of the House Comm. on Banking and Currency, 90th Cong., 2d Sess., *Report on Commercial Banks and Their Trust Activities: Emerging Influence on the American Economy* (Subcomm. print 1968); Staff of the Senate Committee on Governmental Affairs, 96th Cong., 2d Sess., *Institutional Shareholders and Interlocking Directorates Among Major U.S. Corporations*, (December 1980). Cross referencing the published list of directors of insurance companies in the 1928 volume of the Poor's Register of Directors of the United States with the 1928 volume of the Moody's Bank and Finance Manual confirms the early date and steady continuity of the practice. *See*, The Brief of American Council of Life Insurance as Amicus Curiae in Support of the Petition at 3.

312 U.S. at 351-52.

Here, as in *Bunte Bros.* and *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513-14, "[f]ailure to use such an important power for so long a time indicates" that the government did not believe the power existed. *See* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 543 (1947).[20] The Government's assertions—based on *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, and *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533—that the reach of an antitrust statute is not necessarily limited to the view of its bounds current at the time of its passage, and that failure to prosecute in the past does not necessarily bind the government in the future, 656 F.2d 441, 449, should not be persuasive here in the face of "more than sixty years" of implicit approval of such a widespread and highly public practice—which, by the government's theory, has always been illegal. This history is not "equivocal" evidence of the government's contemporaneous understanding. *See Zenith Radio Corp. v. United States*, 437 U.S. 443, 450:

> [A]n administrative "practice has peculiar weight when it involves a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933); *see, e.g., Power Reactor Co. v. Electricians*, 367 U.S. 396, 408 (1961).

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[20] It has been the consistent and salutary practice of this Court to give great weight to the contemporaneous and long-continued interpretation made by an administrative body charged with the administration and enforcement of a statute and to scrutinize closely any assertion—by the government or a private body—that such an interpretation should be upset. *See, e.g., United States v. Clark*, No. 80-1121, slip op. at 10 (Jan. 12, 1982); *Bryant v. Yellen*, 447 U.S. 352, 366 n.16, 377; *United States v. Hill*, 120 U.S. 169, 182 (1887); *Edward's Lessee v. Darby*, 12 Wheat. 206, 210 (1827). *See generally* Griswold, *A Summary of the Regulations Problem*, 54 Harv. L. Rev. 398, 404-11 (1941).

Moreover, the normal inference from the inaction of the Justice Department is corroborated here by express consideration of the issue by other interested arms of the government:

Federal Trade Commission

- 1950— Report of the Federal Trade Commission on Interlocking Directors, H.R. Doc. No. 652, 81st Cong., 2d Sess. 10 (1950) ("FTC Report"):

> The Clayton Act's two sections dealing with interlocking directorates embody three different rules of law applicable to different classes of corporations. One rule [found in the competing corporations paragraph] governs corporations engaged in commerce which are *neither* banks, banking associations, trust companies, nor common carriers .... The rule [contained in the competing corporations paragraph] does not apply to interlocking directorates among small corporations ...; between corporations that are related to each other as seller and buyer; and *between industrial and commercial corporations and financial institutions or common carriers.* [Emphasis added.]

The 1950 FTC Report refers to the competing corporations paragraph as the "rule of law applied to nonbanking corporations in Section 8 of the Clayton Act." FTC Report, *supra* at 37.[21]

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[21] Despite the explicit statements in the FTC Report narrowing the scope of Section 8, the court of appeals dismissed the FTC Report as "equivocal" and in any event "of little force" in light of *In re Perpetual Federal Savings & Loan Ass'n.*, 90 F.T.C. 608(1977), *vacated on other grounds*, 94 F.T.C. 401 (1979). *See* 656 F.2d at 448-49. Although in a later section of the Report the Commission does examine vertical bank/non-bank interlocks, the statements regarding the limited scope of Section 8 are made at the beginning of the Report in a general section dealing with the origins and scope of the law. The reliance of the court below on *Perpetual*, a decision not rendered until 1977, is moreover misplaced since that case dealt with an issue of statutory construction under Section 5 of the Federal Trade Commission Act and not Section 8 of the Clayton Act.

- 1971— Alan S. Ward, then Director, Bureau of Competition, Federal Trade Commission, affirmed the exclusion of banks during the hearings on the Banking Reform Act of 1971:

> And the Clayton Act's grant to the Federal Trade Commission of enforcement responsibility for the interlocking directorate prohibitions embodied in Section 8 of that act also excepts banking and other regulated industry interlocks. (Committee on Banking and Currency, Hearings on H.R. 5700, 92d Cong., 1st Sess. (1971).)

Congress

- 1965— Staff of the Antitrust Subcommittee of the Committee on the Judiciary of the House of Representatives, 89th Cong., 1st Sess., *Interlocks in Corporate Management* 26 (Comm. Print 1965), noted the following exception in the fourth paragraph of Section 8:

> *Exemptions.* By its terms, the provision does not apply unless at least one of the corporations included has capital, surplus, and undivided profits that aggregate more than $1 million. Nor does it apply to interlocks with banks, banking associations, or trust companies, or with common carriers.

- 1968— Staff of the Subcommittee on Domestic Finance of the House Committee on Banking and Currency, 90th Cong., 2d Sess., *Report on Commerical Banks and their Trust Activities: Emerging Influence on the American Economy* 39-40 (Subcom. print 1968) ("Banking Report"):

> [T]he law [Clayton Act] does not apply to interlocks between commercial banks and competing financial institutions, such as mutual savings banks, insurance companies, and small local companies.

> Based on its study, the staff recommended "for consideration of the Congress, the Executive Branch and the regulatory agencies for legislative and administrative action":
>
> > Prohibition against any officer or director of a commercial bank, a mutual savings bank, a savings and loan association or an insurance company from serving as an officer or director of any other commercial bank, mutual savings bank, savings and loan association or insurance company or any other financial institution. . . . It would close a major loophole in existing Federal law prohibiting interlocking directorships. (Banking Report, *supra* at 9-10.)

Yet, all legislative efforts to proscribe interlocking directorates between banks and other financial institutions such as insurance companies have failed.[22] While this Court has cautioned against relying too heavily on the views of a subsequent Congress, it has also counseled against rejecting such views out of hand. *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8. Indeed such views are particularly entitled to significant weight here, if, as the appellate court below contends, "the precise intent of the enacting Congress is obscure." *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596. The legislative history, Congressional interpretation and action, the long-standing interpretation of the FTC, and the implicit acceptance of such an interpretation by the Justice Department evidenced by the absence of prosecution of bank/non-bank interlocks for more

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[22] The Banking Reform Act of 1971, H.R. 5700, 92d Cong., 1st Sess., was aimed at preserving competition between insurance companies and other financial institutions and would have specifically prohibited an insurance company director from serving on the board of an insured bank. H.R. 5700 died in committee. A long line of attempts by Congress to enlarge Section 8 by amending it to prohibit director, officer, or management employee interlocks, between *inter alia* (a) actual or potential competitors, or (b) actual or potential customers, or suppliers, or sources of credit or capital, have all lapsed in committee. *See* H.R. 2509, 90th Cong., 1st Sess. (1967); H.R. 3245, 90th Cong., 1st Sess. (1971); H.R. 14997, 93d Cong., 2d Sess. (1974); H.R. 4406, 94th Cong., 1st Sess. (1975); H.R. 7337, 95th Cong., 1st Sess. (1977).

than sixty years, all confirm that Section 8 should not now be found to apply to bank/non-bank interlocks.

IV. General Presumptions Based on Broad Policies in Favor of Competition and Against Implied Exemptions to the Antitrust Laws Should Not Prevail Over the Specific Language and Consistent History of Section 8.

The government's strategy in this case has been to neutralize the language and the history of the statute so that the case could be decided on the basis of presumptions: 1) that maximum competition is to be preferred under the antitrust laws, and 2) that implied exemptions to that policy are to be narrowly and suspiciously viewed. The more or less explicit syllogism is as follows: competition would benefit from prohibition of the interlocks at issue; Congress wished to protect competition from the effects of anticompetitive interlocks; therefore Congress prohibited these interlocks unless the contrary can be proved. This imaginative but tenuous argument should be rejected for several reasons.

First, it engrafts onto Section 8 a presumption of illegality that is simply not there. Section 8 sets forth a bright-line, prophylactic rule: it identifies certain interlocks in formal and quantitative terms, and only the identified interlocks are prohibited. Interlocks within a defined universe are prohibited without regard to any inquiry into an actual impact of the interlocks because such arrangements are viewed as presenting a potential for anticompetitive conduct. *SCM Corporation v. FTC*, 565 F.2d 807, 811 (2d Cir. 1977). Some harmless interlocks are interdicted, *TRW Inc. v. FTC*, 647 F.2d 947 (9th Cir. 1981), and various arguably anticompetitive interlocks such as vertical bank/non-bank interlocks are untouched. *See* Report of the Federal Trade Commission on Interlocking Directorates, H.R. Doc. No. 652, 81st Cong. 2d Sess. (1950).

Compare Section 1 of the Sherman Act for instance, under which all anticompetitive contracts and combinations are prohibited and the government and the courts have broad leeway in identifying and pursuing those which are anticompetitive. Elastic statutory concepts such as "restraint of trade" or "lessening of competition," which must be accorded some measure of

flexibility in order to catch new forms of evil, were not written into section 8.[23]

Section 8 specifically deals with a defined problem—interlocks among corporations "other than banks." It provides a limited solution, discrete limitations on its scope, and no mechanism by which the statutes may be expanded by the executive branch or by the courts. The proper referrent for the enforcement agency and the Court is the terms of the statute and not the policy implications of the interlocks. Section 8 does not grant or require that sort of qualitative discretion.

Second, there is no issue of exemption from the substantive constraints of the antitrust laws involved here. Unlike an exemption, Section 8 grants no immunity from the antitrust laws. *United States v. Philadelphia National Bank*, 374 U.S. 321, demonstrates the application of the substantive constraints of the antitrust laws to banks; and the exemption for insurance companies, to the extent it exists, is contained in the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* Unlike an exemption or immunity which grants the recipient the prerogative of engaging in anticompetive conduct, the exclusion from Section 8 coverage does not operate to allow any anticompetitive actions. Any showing of actual anticompetitive conduct may be fully prosecuted under the antitrust laws. Section 8 is a preventive measure that seeks to proscribe certain situations which were perceived to have the potential for facilitating anticompetitive conduct. *See SCM Corporation v. FTC*, 565 F.2d 807, 811 (2d Cir. 1977).

Third, the government's position and the opinion of the court below allow the putative "general purpose" of the Clayton Act to transcend the words that supposedly embody it,

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[23] Section 8 is not like the Sherman Act or Section 10(b) of the Securities Exchange Act of 1934, statutes designed to pick up new forms of old evils, where precise bounds would merely reward clever evasion and defeat the deterrent effect of the law. *See, e.g., National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 688; *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 748; *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787; *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151; *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6, 12.

and to contradict the words completely where they seem inconvenient to the perceived purpose. When a court moves beyond the words of a statute and ventures into the realm of Congressional purpose and policy—the "less direct" evidence of Congressional intent in the Ninth Circuit's own formulation—it runs a danger of going too far. This Court has summed up the proper counsel on judicial restraint: "Care must be taken, however, to respect the limits up to which Congress was prepared to enact a particular policy, especially when the boundaries of a statute are drawn as a compromise resulting from the countervailing pressures of other policies." *United States v. Sisson*, 399 U.S. 267, 298. Fidelity to the words of Section 8 and the defined scope of the Congressional purpose in enacting it should preclude application of Section 8 here.[24]

In *United States v. Cooper Corp.*, 312 U.S. 600, the government tried to enlarge Section 7 of the Sherman Act fifty years after its enactment, as it has tried here to enlarge Section 8 of the Clayton Act sixty years after its enactment. In *Cooper* the government asked this Court to "construe the Act as not to deny to the Government what public policy is thought to require." *Id.* at 605. The Court refused. Here, as in *Cooper*, proper respect for the limits of the judicial function, and fidelity to the limits of the power granted by Congress as expressed in the straightforward language of Section 8, preclude coverage of bank/non-bank interlocks.

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[24] "[A]s the second Mr. Justice Harlan said, when speaking for the Court in another context, a statute is 'not an empty vessel into which this court is free to pour a vintage that we think better suits present-day tastes.' *United States v. Sisson*, 399 U.S. 267, 297 (1970). Considerations of this kind are for Congress, not the courts." *National Broiler Marketing Ass'n. v. United States*, 436 U.S. 816, 827. *See also* Frankfurter, *Some Reflections on the Readings of Statutes*, 47 Colum. L. Rev. 527 (1947) (judicial restraint called for where the Court is asked to amend legislation to remedy the perceived failings of Congress to effect its own intent).

CONCLUSION

For all of the reasons set forth above and for the additional reasons advanced in the Brief for the Petitioners, the decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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August, 1982

Docket Sheet

NO. 81-1487-CFX	TITLE BankAmerica Corporation, et al., Petitioners v. United States

DOCKETED	COURT
February 8, 1982	United States Court of Appeals for the Ninth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioners: William Simon, Robert D. Raven H. Helmut Loring, Edward Wolfe , Ira M. Millstein, J. Randolph Wilson Counsel for Respondent: Solicitor General
February 8, 1982	Petition for writ of certiorari filed.
February 8, 1982	Appendix filed.
Feb. 9, 1982	Brief, amicus curiae, of American Council on Life Insurance in support of petition filed.
Feb. 10, 1982	Brief, amici curiae, of The New York Clearing House Association, et al. filed.
Feb. 19, 1982	Order extending time for the Government to file a response to the petition until Apr. 9, 1982.
Apr. 12, 1982	Order further extending time for the Government to file a response to the petition until Apr. 30, 1982.
May 3, 1982	Order further extending time to file a response to the petition until May 7, 1982.
May 7, 1982	Brief for the U. S. in opposition filed.
May 12, 1982	DISTRIBUTED. 5-27.
May 21, 1982	Reply brief for the petitioners filed. (D).
June 1, 1982	The petition for writ of certiorari is GRANTED. --- ---
June 10, 1982	Order extending time to file the joint appendix and petitioners' brief on the merits until Aug. 16, 1982.
Aug. 16, 1982	Brief, amicus curiae of the American Council of Life Insurance filed.
Aug. 16, 1982	Brief, amicus curiae of the NY Clearing House Assn., California Bankers Clearing House Assn. and the American Bankers Assn. filed.
Aug. 16, 1982	Joint appendix filed.
Aug. 16, 1982	Brief for petitioners filed.
Sept. 14, 1982	Order extending time to file the respondent's brief on the merits until Oct. 15, 1982.
Oct. 8, 1982	Order further extending time to file the respondent's brief on the merits until Oct. 25, 1982.
Oct. 25, 1982	Brief for respondent U. S. filed.
Nov. 17, 1982	CIRCULATED.

(OVER)

81-1487

Title

No.

DATE	PROCEEDINGS AND ORDERS
Jan. 5, 1983	Joint reply brief of petitioners', Prudential Ins. Co. of America, et al. filed.